

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From April 1, 1940
Through June 30, 1940
Volume XIX

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from April 1, 1940 through June 30, 1940.

The Act referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,
Attorney General.

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OPINIONS

April 1, 1940.

Hon. Claiborne Blanton, Member,
Dallas County Court of County Revenues,
Selma, Alabama.

Elections—Returning Officers—

Only prerequisite to appointment as returning officer is that appointee be a qualified elector.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 29, 1940, in which you request my opinion as follows:

"Does the law require the appointing officials of a County to appoint as Returning Officer the beat committeeman?"

"It appears that we here have had a custom of appointing as Returning Officer of each box, the Committeeman who has been elected, or is it required by law?"

Replying to your inquiry, please be advised that there is no requirement of law that the beat committeeman be appointed returning officer. Your attention is directed to Section 437 of the Code of Alabama, 1923, which provides for the appointment of election officials as follows:

"Section 437. Officers of election; how appointed.—The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more than twenty nor less than fifteen days before the holding of any election in their county, **appoint from the qualified electors** of the respective voting places, three inspectors and two clerks for each place of voting, and **returning officer for each precinct**, to act at the place of holding elections in each precinct." (Emphasis ours)

You will note that the only prerequisite qualification is that the person appointed be a "qualified elector."

For your further information, I am enclosing herewith a copy of an opinion rendered by this office under date of February 10, 1940, to Hon. J. D. Sexton, Clerk of the Circuit Court, Marion County, which opinion discusses in detail the procedure to be followed for the appointment of returning officers in the event the judge of probate and clerk of the circuit court are disqualified to act as the appointing board for the primary to be held on May 7, 1940.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 1, 1940.

Hon. J. Fred Gurley,
Tax Collector, Calhoun County,
Anniston, Alabama.

Municipal taxes—

Tax Collector of Calhoun County, in collecting municipal taxes should pay all fees for delinquency under Section 162 of the 1935 Revenue Act into the county treasury.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your letter of December 16, 1939, in which you request my opinion as follows:

"Please give me your interpretation of the attached bill pertaining to fees.

"I am on a salary of \$300.00 per month (special act Calhoun and Tuscaloosa) by local bill. This bill, a copy of which I am enclosing, was passed during the last session of the Legislature. Under this I am paying myself $\frac{1}{2}$ of one percent for collecting municipal tax and the assessor $\frac{1}{2}$ of one percent for assessing municipal tax. I want to know what I shall do with the delinquent fees collected after January 1, 1940. Since the State, County and City Tax is collected on one receipt I can collect only one fee on each receipt. Shall I keep the fees collected or pay them into the general fund of the county?"

In answering your request, I am assuming that when you refer to delinquency fees, you are referring to the fees provided by Section 162 of the 1935 Revenue Act, which provides as follows:

"Section 162. For making actual demand on delinquent taxpayers, the collector shall be entitled to receive a fee of fifty cents for each taxpayer on whom such demand is made, which shall be charged against such taxpayer and collected for the use of the collector in the same manner and by the same means as taxes are collected, **but he shall charge only one fee against each taxpayer.** For making a levy on and sale of personal property for the collection of taxes, the collector shall be allowed a fee of one dollar, to be collected out of the property and in addition thereto, he shall be authorized to collect out of such property the actual expenses of keeping and moving the same to the place of sale, the collector may sell any personal property levied on at any place in the precinct that he may determine, or may move the same to the courthouse of the county for sale. For the levy on the sale of a tract, parcel or lot of land assessed to one owner, or to 'owner unknown' the collector shall receive a fee of fifty cents in addition to the demand fee on such delinquent taxpayer, and said fee to be made a part of the decree of sale and collected with the taxes due on the land sold or levied on for sale." (Emphasis ours)

In my opinion, the fees for delinquency collected by you under Section 162, supra, should be covered into the county treasury.

Act No. 488, H. 1065, approved September 13, 1935 (Local Acts, 1935, page 269), provides in part as follows:

"Section 1. * * * The Salary of the Tax Collector shall be Three Thousand Six Hundred Dollars per annum net; and he is hereby allowed the further and additional sum of Twenty-five Hundred Dollars per annum for clerical assistance and expenses. * * * The above named amounts shall be in lieu of all compensations and allowances now allowed to the respective named officers, and of all compensations and allowances that may hereafter be allowed said officers. These amounts shall be paid out of the county treasury of Calhoun County monthly as the salaries of other county officers are paid.

"Section 2. The above named officers shall collect the fees, allowances and compensations heretofore collected by them, and the fees, allowances and compensations which may hereafter be collected by them, and shall cover such fees, allowances and compensations into the County Treasury on or before the fifth day of each month." (Emphasis ours)

This office in an opinion to Hon. Coley Page, Tax Collector, Jackson County, Scottsboro, Alabama, held that a county tax collector, collecting municipal taxes in making a demand on a delinquent city taxpayer for his delinquent taxes, is not entitled to any additional fee for making said demand, as he is expressly limited to only one demand fee on a delinquent taxpayer, such demand to include the delinquent state, county and city taxes. The fee of fifty cents as provided by Section 162 of the 1935 Revenue Act is for making the demand for the delinquent state and county taxes, and no additional fee attaches by reason of the demand including the city taxes.

A copy of said opinion is enclosed for your convenience.

This principle is also applicable to the other fees, provided under Section 162, supra. The fees under said section attach by reason of the tax collector performing services relative to the state and county taxes, and the fact that the city taxes are now included does not call for any additional fees under this section. In common parlance, the city taxes get a free ride under this section.

If the Legislature had not passed Act No. 555, S. 426, approved September 16, 1939 (Local Acts, 1939, page 340, Pamphlet), which gave you the compensation, fees, commissions and allowances, fixed by the governing body of the municipalities for collecting their taxes, you would have had to pay the compensation allowed you by the municipalities for collecting their taxes into the county treasury under Act No 488, H. 1065, approved September 13, 1935 (Local Acts, 1935, page 269), the pertinent part quoted supra.

The premises considered, it is therefore my opinion that as no additional fees attach under Section 162 of the 1935 Revenue Act, by reason of your collecting the municipal taxes, you should pay all fees for delinquency under said section into the county treasury, as provided by a part of Act No. 488, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 2, 1940.

Hon. H. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

Counties—Governing Bodies—Public Grounds—

County governing body authorized to purchase grass seeds, shrubbery, rose bushes and fertilizer for use in maintaining the grounds of county public buildings.

Code, 1923, Section 6755(1);

General Acts, 1931, p. 298;

Local Acts, 1932, Extra Session, p. 84.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your request for official opinion dated March 26, 1940, as follows:

"I desire your opinion as to whether or not the treasurer of Jefferson County would be authorized to pay reasonable charges authorized by the County Commission for the purchase of grass seeds, shrubbery, rose bushes and fertilizer, such items to be used in properly maintaining the grounds of the courthouse, county hospital and county home.

"In this connection, I call your attention to Section 5 of the Act creating the County Commission of Jefferson County, 1931 General Acts, page 298, which provides that the Commission shall have the power and authority to direct and control the property of the county as it may deem expedient according to law. In Section 6 of this same act, the Commission is given all of the jurisdiction and powers then or thereafter conferred upon courts of County Commission or Boards of Revenue in the state.

"I further call your attention to Section 9 of the 1932 Legal Acts further defining the powers and duties of the county commissioners, Local Acts of 1932, page 84:

"Section 9. That the property of said County of every nature, character, and description, whether real, personal or mixed, shall be under the supervision and control of the County Commission, who shall exercise the power to sell, regulate and define the use thereof, and may make such rules and regulations as they may deem prudent and expedient for the care, protection and use of such property."

I am of the opinion that the treasurer of Jefferson County is authorized to pay the cost of grass seeds, shrubbery, rose bushes and fertilizer used in maintaining the grounds of the courthouse, county hospital and county home,

provided such purchases are approved by the County Commission as a reasonable expense in the upkeep of said grounds.

The Commission is empowered by Section 6755(1) of the Code of 1923 and Sections 5 and 6 of Act No. 271, H. 824, approved June 16, 1931 (General Acts, 1931, p. 298), and by Section 9 of Act No. 198, H. 596, approved November 3, 1932 (Local Acts, 1932, Extra Session, p. 84), "to direct and control the property of the county as it may deem expedient according to law."

This necessarily includes, in my opinion, maintenance of the grounds of public buildings in such condition as is customary and usual with other public buildings and grounds by landscaping and planting. The power to control implies the power to maintain, and to maintain, in my opinion implies such maintenance as is usual, customary and seemly with similar property. It is a matter of common knowledge that the public buildings and grounds of the State and of other states are ornamented with plants, shrubbery, trees and flower beds. There is no reason why the public buildings and grounds of the counties of this State should not be accorded the same treatment.

In an opinion of this office rendered December 5, 1939, to Hon. Albert S. Towle, Member of the Revenue and Road Commissioners of Mobile County, (Quarterly Report of Attorney General, Vol. XVII, page 337) it was ruled that installation of venetian blinds in the county courthouse for protection of employees from the glare of the sun was proper county expense.

In an opinion to Hon. Oliver E. Young, Senator, 12th Senatorial District, dated March 30, 1939 (Quarterly Report, Vol. XIV, page 286), it was ruled that "decoration" of a county public library building was authorized as a county expense.

And in an opinion to Hon. Chris J. Sherlock, Director, State Highway Department, dated August 14, 1939 (Quarterly Report, Vol. XVI, page 156), it was ruled that a county might expend its funds for "beautification" of its highways provided such "beautification" is incidental to the proper maintenance and construction of the highway; although it was held in a prior opinion, dated July 22, 1939, to Hon. J. F. Posey, Judge of Probate, Autauga County, (Quarterly Report, Vol. XVI, page 97) that where "beautification" of the roadway was the sole and exclusive object of the disbursement of county funds, it could not be paid for out of county gasoline funds.

As it is a generally accepted belief that public buildings and grounds require a reasonable amount of ornamentation appealing to the esthetic sense of man, such ornamentation or "beautification", if incidental merely, may be properly provided at public expense.

In my opinion the authority of the County Commission of Jefferson County does not differ in this respect from that of other county governing bodies. Section 6755(1), Codes, 1923, 1928, affords ample support for this opinion.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 2, 1940.

Hon. C. E. Carmichael, Chairman,
Alabama Bridge Commission,
Florence, Alabama.

Constitutionality—Alabama Bridge Commission, an agency of the State of Alabama.

Act No. 580, H. B. 847, approved September 22, 1939 (General Acts, 1939, page 936, Pamphlet) is constitutional and valid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

“Re: Dauphin Island Bridge.

“Pursuant to the provisions of Act No. 44, of the Legislature of Alabama, approved February 7, 1935, as amended, and particularly as last amended by Act No. 580 of the Legislature of Alabama, approved September 22, 1939, the Alabama Bridge Commission (An Agency of the State of Alabama) proposes to construct a highway toll bridge across Mississippi Sound, from a point at or near Cedar Point, in Mobile County, Alabama, to a point on Dauphin Island (an island forming a part of the State of Alabama), and has applied to Reconstruction Finance Corporation for a loan to be made through the issuance and sale of revenue bonds of the Commission in a principal amount not to exceed \$900,000, the proceeds of which are to be used in the construction of such Bridge.

“Under the provisions of Condition 6 of the First Resolved clause of a resolution adopted by Reconstruction Finance Corporation on July 31, 1939, as amended by resolution adopted by Reconstruction Finance Corporation on October 16, 1939, approving such loan, subject to the terms and conditions set forth in said resolution, as so amended, copies of which original and amended resolution are herewith submitted, the Commission is required to obtain an opinion from you as to the validity and constitutionality of said Act No. 580 of the Legislature of Alabama, approved September 22, 1939.

“The Commission therefore respectfully requests your opinion upon the validity and constitutionality of said Act No. 580.”

The act under consideration is Act No. 580, H. B. 847, approved September 22, 1939 (General Acts 1939, page 936, Pamphlet), the title of which is as follows:

“An Act to amend An Act entitled ‘An Act to authorize the creation and incorporation of a Commission, providing for its powers and duties,

authorizing it to lease or purchase construct and reconstruct Highway Bridges, approaches and appurtenances thereto, across any river in the State of Alabama or across any body of water separating the main land of the State of Alabama from any island forming a part of the State of Alabama, to maintain and operate said bridges, approaches and appurtenances thereto, and charge tolls thereon, and to issue bonds; providing for the payment of such bonds and providing for the rights and remedies of bondholders,' approved February 7, 1935, as amended; and to authorize the State Highway Department to aid in the construction, reconstruction, maintenance and operations of any such Bridges, and to contract with such Commission with reference thereto; and to ratify the change heretofore made in the name of the corporation organized pursuant to said act."

I have examined said act and, in my opinion, it is constitutional and valid. I am unable to find any constitutional objections to the act or any of the provisions thereof.

The 1939 Act, *supra*, is an amendment of Act No. 44, H. B. 132, approved February 7, 1935 (General Acts, 1935, page 94), which authorized the creation and incorporation of a Bridge Commission. The 1935 Act and the 1939 amendment are both patterned after Act No. 292, H. B. 341, approved August 31, 1927 (General Acts, 1927 page 278), providing for the incorporation of the Alabama State Bridge Corporation. The constitutionality of the 1927 act was upheld by our Supreme Court in the case of *Alabama State Bridge Corporation, et al v. Smith*, 217 Ala. 311, 116 So. 695. Our Supreme Court in that case held that the creation of such a corporation with power to construct highway bridges to be operated for tolls, and to issue bonds for the construction of such bridges, payable solely out of toll revenues from such bridges and certain other revenues, and pledging as security for such bonds the right to collect such tolls, and the surplus, if any, of certain other revenues, did not constitute the creation of a debt against the State within the contemplation of Section 213 of the Constitution of 1901. This case has been cited with approval several times by our Supreme Court in analogous situations. See *In re Opinion of the Justices*, 225 Ala. 460, 143 So. 900; *Scott et al. v. Alabama State Bridge Corp.*, 233 Ala. 12, 169 So. 273; *Rogers v. Garlington*, 234 Ala. 13, 173 So. 273; *Long et al v. Alabama Highway Corp.*, 234 Ala. 142, 174 So. 4; *Harman v. Alabama College*, 235 Ala. 148, 177 So. 747; *Keller v. State Board of Education of Alabama*, 236 Ala. 400, 183 So. 268, and additional authorities cited in these cases.

Section 4 of the 1935 Act provides, in part, as follows:

"Section 4. FORM AND CONTENT OF BONDS. The principal of and interest on bonds herein authorized to be issued by the Commission shall be payable solely from the revenues to be derived from the tolls levied and collected in connection with the operation of the Bridge for which such bonds have been issued, and shall not constitute an indebtedness of the State, or any municipality, county, or political subdivision of the State within the meaning of any constitutional or statutory provision of the laws of the State. * * *"

Considering the above quoted excerpt of the 1935 act, together with the opinions of the Supreme Court above cited, it is my judgment that the issuance by the Alabama Bridge Commission (An Agency of the State of Alabama) of bonds under the provisions of said act would not create a debt

against the State within the meaning of Section 213 of the Constitution, as amended by Amendment No. 26, proclaimed ratified August 2, 1923.

The specific provisions of the act authorizing the State Highway Department to aid in the construction, reconstruction, maintenance and operation of such bridges built by the Commission and to contract with the Commission with reference thereto, do not render said act violative of section 213 of the Constitution of 1901, as amended by Amendment No. 26, *supra*. **Long et al v. Alabama Highway Corp.**, *supra*; **Scott et al v. Alabama Bridge Corp.**, *supra*; **Rogers v. Garlington**, *supra*.

The fact that mandamus or other suit may be brought against the Commission or the members thereof, or against the Highway Department or the director or other officer or officers thereof charged by law with the exercise of the powers, duties and authority of said department, or against any other department, agency or instrumentality of the State, or any officer or officers thereof charged by law with the exercise of any powers, duties or authority with respect to the construction, reconstruction, maintenance or operation of said bridges, etc., does not render the act invalid. **Keller v. State Board of Education of Alabama**, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 3, 1940.

Hon. Eugene H. Hawkins,
Judge of Probate,
Jefferson County,
Birmingham, Alabama.

Acts—Constitution—Section 45—Statutes Jefferson County Inferior Courts—Election of Judges—

1. Under Act 526, H. 738, approved September 21, 1939 (General Acts, 1939, p. 817), Judges of Inferior Courts which are now required by law to be elected by voters of less than whole of territory over which such Court has jurisdiction shall be elected by voters of entire territory over which such Court has and exercises jurisdiction.

2. Judge of Inferior Court created under Act 193, H. 515, approved November 13, 1932 (Local Acts, Extra Session, 1932, p. 76) now required under Act 526, H. 738, approved September 21, 1939, to be elected by the voters over the entire territory over which such Court has jurisdiction.

3. Under Section 4 of Act 193, H. 515, approved November 3, 1932, Court has jurisdiction concurrent with the Circuit Court of Jefferson County of all misdemeanors committed within said county.

4. Act No. 526, H. 738, approved September 21, 1939 (General Acts, 1929, p. 817), complies with Section 45 of the Constitution of 1901.

5. Act 193, H. 515, approved November 3, 1932 (Local Laws, Extra Session, p. 76) complies with Section 45 of the Constitution of 1901.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 29, 1940, in which you request my opinion as follows:

"The Judge of the Inferior Court of Ensley of Jefferson County must be elected this year, and there are five candidates for the democratic nomination for said office to be voted upon in the primary of May 7. This court was created by Act of the 1932 Legislature, Local Acts 1932, page 76. By Act of the 1939 Legislature, house bill 738, approved September 21, 1939, appearing in the temporary bound volume of the Acts of 1939, page 817, it is provided that such judges must be elected by the voters of the whole territory over which such court exercises jurisdiction.

"As you notice, under Section 4 of the latter Act, it is provided that said Act shall apply only in counties of 400,000 or more. This proviso does not appear in the title to the Act.

"You will further note that in the Act creating the Court, Section 3 gives the Court civil jurisdiction in the four precincts mentioned in the title to the Act, but that Section 4 purports to give the Court limited criminal jurisdiction in the whole county. However, the title to the Act limits the criminal jurisdiction to the four precincts mentioned therein.

"Kindly advise me whether or not the names of candidates for Judge of this Court must appear on the ballot for the whole county or for only the four precincts mention in the 1932 Act. The absentee ballots for this county must be printed as soon as possible, and I will appreciate a prompt reply."

I call your attention to Act 526, H. 738, approved September 21, 1939, (General Acts, 1939, p. 817) which provides:

"An Act To better provide for the election, and appointment of Judges of inferior courts created in lieu of Justices of the Peace, and other like or similar courts by whatever name called.

"Be it Enacted by the Legislature of Alabama as follows:

"Section 1. The Judge or Judges of each of the several inferior courts of this State created in lieu of Justices of the Peace as well as the Judge or Judges of each like, or similar court by whatever name called, the Judge or Judges of which are now required by law to be elected by the voters of less than the whole of the territory over which

such court has and exercises jurisdiction shall hereafter be elected at the time now provided by law for such elections by the voters of the entire territory over which such court has and exercises jurisdiction.

"Section 2. All laws and parts of laws in conflict herewith are hereby expressly repealed.

* * * *

"Section 4. The provisions of this act shall apply to counties which have, according to the last federal census, a population of 400,000 or more, or which may come into that population class by any subsequent federal census."

Section 45 of the Constitution of Alabama, 1901, provides:

"The style of the laws of this State shall be: Be it enacted by the Legislature of Alabama, which need not be repeated, but the act shall be divided into sections for convenience, according to substance; and the sections designated merely by figures. Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be reenacted and published at length."

In the case of *State ex rel Mims v. Bugg et al*, 196 Ala. 460, 71 So. 699, the Supreme Court in upholding the validity of an Act, the title of which was as follows:

"To abolish the office of county treasurer * * * in the several counties of Alabama,"

and the body of the Act limited its application to counties having a population of 50,000 or less according to the last Federal Census held:

"Since the title of the act manifestly expresses the legislative purpose to abolish the office of county treasurer, the point of the appellant's criticism of this act is, in substance, this: That the title manifests a purpose to abolish the office of county treasurer throughout the state; whereas the body of the act effects that purpose in only a part of the counties of the state. The effect of this contention is to say that the title is broader than the act. In these circumstances the point taken is ruled against the appellant by the case of *Griffin v. Drennen*, 145 Ala. 128, 40 South. 1016, a decision that has been subsequently accepted as authority on this point in *Sheffield Oil Co. v. Pool*, 169 Ala. 420, 53 South. 1027. It was said in the first-cited case, quoting from an early decision:

"When the subject may be comprehended in the title, the act should be upheld."

"The subject of this act is the abolition of the office of county treasurer; and the title is not misleading because of partial (upon classi-

fication) application to counties in the state. That the act in its body does not abolish that office in every county in Alabama does not subtract from the comprehensiveness of the title, which undoubtedly includes the subject with which the act undertakes to deal."

See *State v. Patterson*, 146 Ala. 128, 42 So. 19.

In view of the decision heretofore rendered in the case of *Mims v. Bugg*, supra, I am of the opinion that Act 526, H 738, supra, although the title to the Act is broader than the subject it is not violative of Section 45 of the Constitution of 1901.

The title to Act 193, H. 515, approved November 13, 1932, (Local Acts, 1932, p. 76) reads as follows:

"To create and establish an inferior court of criminal and civil jurisdiction for that part of Jefferson County, Alabama, included within Precincts 29, 45, 52, and 53, as now constituted, in lieu of all justices of peace and inferior courts created in said precincts and notaries public ex officio justices of peace within said precincts; to define the jurisdiction and powers of said court; to provide for the judge, clerks and other officers; their appointment, duties and compensation; to provide for a place for holding said court, the terms and salaries of said judge and other officers of said court, and otherwise to provide for said court." (Emphasis supplied)

Section 4 of Act 193, supra, provides:

"That said court shall have, and is hereby given, jurisdiction concurrent with the Circuit Court of Jefferson County of all misdemeanors committed within said County."

The Supreme Court of Alabama has held: "However broad and comprehensive the subject matter may be if it includes all the provisions of the Act it is valid." *State v. Crook*, 28 So. 745, 126 Ala. 600; *Ex parte Pollard*, 40 Ala. 77. Quarterly Report of Attorney General, Vol. IV, p. 44.

The Constitution of 1901, Section 45, provides that each law shall contain but one subject, which shall be clearly expressed in the title, contemplates but one law; and the provision is satisfied if the law has but one general subject, fairly indicated in the title, which will support all matters reasonably connected with it, and all proper agencies which may facilitate its accomplishment are germane to the title, the form of which must be left to the Legislature and not to the court. *Harris v. State*, 156 Ala. 645, 47 So. 126; *Lovejoy v. County of Montgomery*, 180 Ala. 473, 61 So. 597, 9 Ala. App. 466, 61 So. 600; *Reese v. State*, 16 Ala. App. 430, 78 So. 460; *State v. Abernathy*, 146 Ala. 689, 40 So. 353; *State v. Carter*, 174 Ala. 266, 56 So. 974. All matters, however, which are germane to, and naturally connected with, the subject announced by the title of an Act and not excluded thereby are covered by it and may validly be included in the statute; and for the purpose of determining whether or not a provision is germane to the title a reasonable meaning should be given to the words and context of the provision. 59 C. J. 812.

I am of the opinion that the words "to define the jurisdiction and powers of said court", as used in the title of Act 193, supra, although general in their terms are sufficient to comply with Section 45 of the Constitution of 1901.

Since the Court created under Act 193, supra, is given jurisdiction concurrent with the Circuit Court of Jefferson County of all misdemeanors committed within said County, I am of the opinion that the names of the candidates for Judges of the Inferior Court, under Act 193, supra, must appear on the ballot for the whole County as provided under Act 526, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 3, 1940.

Hon. J. M. Schnell, Chairman,
Mobile County Board of Registrars,
Mobile, Alabama.

Board of Registrars—Electors—Voters—

1. Board of Registrars has the power to transfer names of electors from one precinct to another at any time said Board is in session, upon sufficient evidence being presented to said Board that said names should be transferred.
2. No notice provided to be given electors whose names must be transferred by Board of Registrars from one precinct to another.
3. Board of Registrars may legally notify a voter to appear before them to show cause why his name should not be transferred from one precinct to another.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 26, 1940, in which you request my opinion as follows:

"It is my understanding that, according to law, the Board of Registrars is required when registering a person, as a qualified elector, to properly place that elector in the ward, beat or precinct of his or her domicile, provided it be within the established limits of the County for which the Board has jurisdiction and in no other ward, beat or precinct.

"Bearing in mind the above fact, would you kindly favor this Board with your opinion in a case where a person having qualified and properly

registered in the proper ward, within the confines of the City of Mobile, voted at various times in that ward and later moved his or her domicile to a precinct outside the limits of the city, but within Mobile County, and after a period of a year or more continued to vote in the ward in which he or she registered, he or she having taken no steps to transfer registration from ward to precinct although provided an opportunity by law to do so—

"1. Would it be within the powers of this Board in such a case to have that person legally notified to appear at the proper time set out by law for purposes of purging, and show reason why that person's name should not be purged from the city ward where registered? 8. Failing to appear and contest such action, would the Board be within its powers in purging that person's name from the city ward? 3. If so, could this be legally done at this time (the purging session) without reinstating voter in precinct of last domicile?"

I call your attention to Act No. 454, H. 330, approved September 13, 1935 (General Acts, 1935, page 981), which provides:

"Section 1. That in all counties in this State which may now or hereafter have a population of not less than 100,000 nor more than 300,000 according to the last or any succeeding Federal census, the Board of Registrars shall meet at the Courthouse on the first day of each October and hold daily sessions (Sundays and legal holidays excepted) from and including said date through the succeeding February 1st, for the purpose of registering voters. Said board shall also meet on the first Monday of April of each year and remain in session daily for thirty days (Sundays and legal holidays excepted) for the purpose of purging the registration lists and shall again meet each year on the first Monday after the expiration of one week from the expiration of said last mentioned session and shall remain in session daily for six days for the purpose of hearing objections to striking names from the registration lists.

"Section 2. Said sessions of the Board of Registrars in all such counties shall be in lieu of all other sessions now authorized by law."

Act No. 460, H. 926, approved September 13, 1935 (General Acts, 1935, page 989), provides:

"Section 1. That Section 393 of the Code of Alabama of 1923 as amended by an Act approved August 20, 1927, be amended so as to read as follows: 'Section 392. TIMES FOR PURGING LIST OF REGISTRATION. The board of registrars shall meet in each county on the first Monday in January, 1936, and every two years thereafter, for purging the registration list, and may continue in session one week. The names of those who have died, become non-residents of the State, become insane, and have been convicted of any offense mentioned in Section 182 of the constitution, since being registered, or otherwise disqualified as electors under the provision of the constitution, and any names which may have been fraudulently entered on such list, shall be stricken from the registration list. Any member of the board of registrars who neglects or willfully refuses to perform the duties herein required of him shall be guilty of a misdemeanor and on conviction, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00), and may also be imprisoned in the county jail, or sentenced to hard labor for the

county, for not more than six months. That when said Board of Registrars have sufficient evidence furnished them that any elector has permanently moved from one precinct to another in any County said Board of Registrars shall transfer the name of such elector to the registration list of the precinct to which such elector has moved."

Section 488 of the Code of Alabama, 1923, provides:

"Elector must vote in county and precinct of residence.—At all elections by the people of this state the elector must vote in the county and precinct of his residence and nowhere else, and must have registered as provided in this chapter; and if any elector attempts to vote in any precinct other than that of his residence, his vote must be rejected, except as provided in section 361 (290) of this Code."

This office has heretofore ruled:

"The periods and purposes of meetings of the Board of Registrars of Mobile County provided for by Acts of 1935, page 981, supra, constitutes the only meetings by the said Mobile County Board of Registrars for the purposes now contemplated by the law.

* * * * *

"The Acts of 1935, page 989, you will note, is a general law applicable to every county in the State not otherwise excepted therefrom. In my judgment, this Act is applicable to Mobile County in all parts except where a direct conflict with the Acts of 1935, page 981 exists, in which case the latter act prevails. You will note that the act on page 981, supra, provides a different date for purging the list from the date provided for in the Act on page 989, supra, and is, therefore, controlling in this particular. The other provisions of the Act on page 989, however, in my judgment are not in conflict and, therefore, apply to Mobile County.

"You ask specifically when the Board of Registrars may transfer the name of any elector in accordance with the mandate contained in the Acts of 1935, page 989, supra. In my opinion, this transfer may be made at any time the Board is in session upon the presentation of sufficient evidence in accordance with the provisions of the above named act. You will note that the law specifies no certain session of the Board of Registrars at which this action must be taken.

"In reply to your last question concerning notice, I wish to refer you to Section 393 of the Code of Alabama of 1923 as amended by the Acts of 1927, page 276, which provides as follows:

"393. Notice and hearing when names are to be stricken from list.—When the name of any elector is proposed to be stricken from the registration list, unless he or she is dead or is a non-resident of the state, notice shall be issued to him or her by the board of registrars, citing him or her to appear before the board on the second Monday in February following, and show cause why his or her name should not be stricken from the list. Said notice shall be served by the sheriff at least

five days before the second Monday in February. The board of registrars shall in addition to the above notice give notice in some newspaper published in the county by one insertion.'

"You will note that the only provision contained in the above Section 393 in conflict with the Acts of 1935, page 981, supra, is the provision for different dates set for purging the list. Under the rules of construction announced in the case of **Levy, Aronson and White vs. Jones**, supra, it is my opinion that the notice provided for in Section 393 is applicable to Mobile County, and that such notice should be given five days before the date of hearing objections as provided for by the Acts of 1935, page 981." Opinion to Mrs. Sarah E. Sossaman, Chairman, Board of Registrars, Mobile County, under date of April 25, 1938, Quarterly Report of Attorney General, Vol. III, page 197.

This office has also ruled that the Board of Registrars of Mobile County should transfer the names of electors from one precinct to another at any time said Board is in session, upon sufficient evidence being presented to said Board that said names should be transferred. There is no provision of law requiring notice to be given by the Board of Registrars to an elector that his name be transferred to another precinct before said transfer is made. However, there is no objection to giving the notice. Biennial Report of Attorney General, 1936-38, page 611. Under section 388 of the Code of Alabama, 1923, supra, a person has no right to vote except in the precinct of his residence and it is the duty of the election officials to reject any person attempting to vote in a precinct other than that of his residence, even though his name appears on the qualified list of a precinct other than that of his residence. Quarterly Report of Attorney General, Vol. III, page 195; 236 Ala. 56, 181 So. 498.

The premises considered, I am of the opinion:

1. That it is within the power of the Board of Registrars, but not mandatory, for them to legally notify a voter to appear before the Board to show cause why his name should not be transferred from one precinct to another.
2. That failing to appear and contest such action, the Board of Registrars, upon sufficient evidence being presented to them that the elector has permanently moved from one precinct to another, has the power to transfer his name to the precinct where he lives, but under no circumstances would the Board be authorized to strike the elector's name from the registration list so long as he remains a permanent resident of any precinct within the county.
3. The transfer of the name of an elector in accordance with the mandate contained in Acts of 1935, page 989, supra, may be made at any time the Board is in session.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 4, 1940.

Hon. T. A. Barnett,
Tax Collector,
Walker County,
Jasper, Alabama.

Taxation—Refunds—

Taxpayer paying escape assessment on property not in fact owned by him, entitled to refund if payment was not voluntarily made with knowledge of the facts. (Section 296 et seq. General Revenue Laws of 1935, Gen. Acts 1935, p. 379)

Exemptions—

County's resolution attempting to exempt from taxation lands of corporation located within five miles of a rehabilitation project sponsored by Rehabilitation Administration of the Federal Government authorizes exemption only to extent allowed by Act. No. 405, H. 896, approved September 13, 1939, General Acts, 1939, page 529.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 29, 1940, in which you request my opinion as follows:

"I wish to submit to you for your consideration two matters which have recently been brought to my attention as Tax Collector of Walker County, Alabama.

"I recently collected from a taxpayer in this county the sum of \$12.30, which was paid to me on an escape assessment made against certain properties located in this county which the taxpayer thought belonged to him, along with other persons. This taxpayer has learned subsequent to the payment of the taxes that he does not have any equity in the property at all, and has requested that I refund to him the money so paid. I request your opinion as to whether or not I can legally refund this money and also whether or not there is any method of procedure which the taxpayer may follow to bring about the recovery of these funds.

"I am attaching hereto as a part of this request a resolution to the Board of Revenue of Walker County, Alabama, exempting from county taxation for a period of ten years certain properties of the Homestead Industrial Company. I request your opinion as to whether or not I should follow this resolution and exempt said properties from county taxation."

Replying to your first inquiry, I call your attention to Section 296 of Article VIII, Chapter 6, of the General Revenue Act of 1935 (Act No. 194, H.

324, approved July 10, 1935, General Acts, 1935, pages 256, 379), which provides as follows:

"Section 296. Any taxpayer who through any mistake, or by reason of any double assessment, or by any error, in the assessment or collection of taxes, or other error, has paid taxes that were not due upon the property of such taxpayer, shall, unless such tax was with knowledge of the facts voluntarily paid by the taxpayer, be entitled, upon making proof to the satisfaction of the State Comptroller of such payment, to have such taxes refunded to him if application shall be made therefor, as hereinafter provided, within two years from the date of such payment."

If, therefore, the taxpayer concerning whom you inquire, at the time of the payment of the escape assessment, was without knowledge of the fact that he was not the owner of the property in question, he is entitled to a refund of the taxes paid upon the property. Your attention is called to Sections 297 et seq. of Chapter 6, supra, which sections fully detail the procedure to be followed by the taxpayer in procuring the refund. I am enclosing for your convenience several copies of the form provided by the Department of Finance to be used for filing a petition for refund of taxes paid in error.

Replying to your second inquiry, that is, whether you should follow the resolution which you enclosed, and exempt the property of the Homestead Industrial Corporation, located within five miles of a rehabilitation project sponsored by the Rehabilitation Administration of the Federal Government, from county taxation, you are advised that, in my opinion, the resolution does not conform in all respects to the statute (Act No. 405, H. 986, approved September 13, 1939, General Acts, 1939, page 529), under the authority of which it purports to have been adopted, and therefore you have authority to exempt only such items as are set forth in said statute.

You will note that Act No. 405, supra, permits the county governing body of any county to remit the taxes assessed on "factories or plants and on all extensions or additions to such factory or plant as are already built and operated, and on all plants, works, machinery and other equipment thereof, and also on all of the capital stock of such factories and plants, or increase of such capital stock made for the purpose of making the additions thereto or extensions thereof."

Your attention is directed specifically to the following proviso:

"Provided nothing herein shall authorize the exemption of the land on which such factories or plants are located or proposed to be located."

The resolution which you have attached to your inquiry is in pertinent part as follows:

"NOW, THEREFORE, Be it Resolved by the Board of Revenue of Walker County, Alabama, that the said Homestead Industrial Company, its successors and assigns, be and it is hereby exempted from the payment of all taxes due Walker County, Alabama, upon all its machinery, machinery and lands, now owned by said company, and upon any additions made thereto, for a period of ten years from November 1, 1939,

except that it shall not be exempt from the payment of the county school tax and district school tax levied for school purposes only." (Emphasis supplied)

The attempt by the Board of Revenue of Walker County to exempt the "lands" of the Homestead Industrial Company, its successors and assigns, from the county taxes in question is clearly abortive and in conflict with the proviso hereinabove quoted.

I find that the other matters and things detailed in the resolution conform to Act No. 405, supra, and, except as to the lands, I see no objection to the granting of the exemptions mentioned. Cf. **Pullman Car & Mfg. Corp. of Alabama v. Hamilton**, 229 Ala. 184 (h.n. 4), 155 So. 616.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 4, 1940.

Hon. William A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Executors and Administrators—Costs—Section 5696, Code of 1923.

An administrator who brings suit for the wrongful death of his testator under provisions of Section 5696, Code of 1923, and is unsuccessful in such suit is personally liable for the court costs.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of March 28, 1940, as follows:

"Will you please be so kind as to give me an opinion on the following hypothetical case:

"Assuming that John Doe is the administrator of the estate of William Doe, deceased; that John Doe, as such administrator brings suit against Joe Roe for the wrongful death of William Doe, under Section 5696 of the Code of Alabama, and is unsuccessful in such suit—Can John Doe, individually, be taxed with the costs of the unsuccessful suit?

"I have been cited the case of Kuykendall vs. Edmondson, 87 Southern Reporter, page 883 for authority to the effect that the Administrator,

as an individual can and must be taxed with the costs of an unsuccessful suit under the Death Statute under the theory that the suit is for the benefit of the distributees of the estate and not for the estate, and that the administrator is acting as trustee for the distributees."

My answer to your inquiry is in the affirmative.

Section 5696 of the Code of Alabama, 1923, commonly referred to as the Homicide Statute, reads as follows:

"A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representatives; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; **and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.** Such action must be brought within two years from and after the death of the testator or intestate." (Emphasis supplied)

It will be noted from the above quoted section that any damages recovered by an administrator or executor are not subject to the payment of debts or liabilities of the testator or intestate, but such monies must be distributed by the administrator or executor according to the laws of descent and distribution.

The Supreme Court in the case of **Kuykendall vs. Edmondson**, 205 Ala. 265, 87 So. 882, held that in suits brought under the provisions of Section 2486 of the Code of 1907, which section was brought forward as Section 5696 of the Code of 1923, the damages recovered do not become a part of the estate of the decedent, and such damages must be paid by the administrator to the heirs at law and next of kin. The court further held that no judgment for costs could be rendered against the estate of the decedent in such suits. In the **Kuykendall** case, supra, the Supreme Court quoted with approval from the case of **Hicks vs. Barrett**, 40 Ala. 293. In the **Hicks** case, supra, which was an action brought by an administrator under the then Homicide Statute, the lower court rendered a judgment for costs against the estate of the decedent. On appeal to the Supreme Court, the case was reversed on the grounds that no judgment for costs could be properly entered against a decedent's estate, the court stating that "the judgment is properly *de bonis propriis*."

In 17 Corpus Juris, page 1371, a judgment *de bonis propriis* is defined to be:

"The technical name of a judgment against an administrator or executor to be satisfied from his own property, and not from the estate of the deceased, as in cases where he has been guilty of a *devastavit* or of a false plea of *plene administravit*."

You are, therefore, advised that, in my opinion, in an unsuccessful suit brought by an administrator under the provisions of Section 5696, supra, the court costs may be taxed personally against the administrator, and in no event may such costs be taxed against the estate of the decedent.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 8, 1940.

Hon. Chester A. Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Elections—Alabama Beverage Control Act—

Petition, filed with judge of probate of a county, requesting an election to determine the sentiment of the people of the county as to whether or not alcoholic beverages may be legally sold and distributed in said county, signed by twenty-five per cent of the number of voters voting in the last preceding general election in said county, legally sufficient to invoke jurisdiction of judge of probate to order an election on said question, even though petition fails to allege that the signers thereof constitute twenty-five per cent of the number of voters voting in the last preceding general election and that no such election had been held in said county within a period of less than two years.

Opinion by Assistant Attorneys General Garrett and Loeb.

Dear Sir:

I have your letter of April 4, 1940, in which you request my opinion as follows:

"On the 20th day of March, 1940, there was filed in my office a petition calling for an election to be held in accordance with the provisions of Section 51 of Act No. 66, H. 44, passed over the Governor's veto on February 2, 1937.

"I checked the petition as filed in my office and found that it contained the names of qualified electors of Tuscaloosa County in an amount more than twenty-five percent of the number of voters voting in the last preceding general election. I further found from the records of Tuscaloosa County that there had been no other such election held in Tuscaloosa County within a period of less than two years prior to the date of filing of the petition.

"I thereupon issued an order on the 22nd day of March, 1940, calling an election to determine whether or not Tuscaloosa County should be wet or dry, setting the date of the Election as of May 1, 1940.

"It has come to my attention that those parties interested in the dry cause are questioning the legality of the petition filed in my office on March 20, 1940, on the ground that the said petition did not contain allegations to the effect that the names signed to the petition constitute twenty-five percent of the number of voters voting in the last preceding general election, and did not contain an allegation that no other such election had been held in Tuscaloosa County within the period of less than two years prior thereto.

"In view of the fact that I might be liable for the costs of the election in the event it should be later held that the petition was insufficient, I request your opinion as to whether or not the said petition was in sufficient compliance with Section 51 of the A. B. C. Act, supra, and whether or not I was within my rights in checking the list of names attached to the petition to determine the number and status of the names affixed thereto. I also request your opinion as to whether or not I was within my rights in taking judicial knowledge of the fact that no other such election had been held in such county within a period of less than two years.

"I am attaching hereto and making a part of this request for an opinion a copy of the original petition, my order setting the date for the election, the notice published in a newspaper published in Tuscaloosa County, as well as an opinion of my attorney relating to the question involved."

The petition, which was presented to you, with the signatures omitted, is as follows:

"TO THE PROBATE JUDGE OF TUSCALOOSA COUNTY, ALABAMA:

"COME the undersigned, who are qualified voters of Tuscaloosa County, Alabama, and file with you this their petition that you call an election for Tuscaloosa County, Alabama, to determine the sentiment of the people of Tuscaloosa County, Alabama, as to whether or not alcoholic beverages can be legally sold or distributed in Tuscaloosa County, Alabama, and to determine whether or not Tuscaloosa County, Alabama, shall be wet or dry under the Alabama Beverage Control Act, this petition being filed under and in accordance with law, and as provided by the Alabama Beverage Control Act, and said election to be called and held and conducted in the manner and within the time and as provided by law?" (Then follows the signatures).

The copy of your order calling the election reads:

"THE STATE OF ALABAMA)
COUNTY OF TUSCALOOSA)

"Petitions signed by 1060 qualified voters in Tuscaloosa County, Alabama, voting in the general election held throughout the State of Alabama on the day of November, 1938, which is the last preceding

general election held in said County and State having been filed with me as the Probate Judge of said County as provided by Section Fifty-one (51) of the Alabama Beverage Control Act, requesting me as such Probate Judge to call an election for said Tuscaloosa County, Alabama, to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in such County; and it being made to appear that 2140 votes were cast in the last preceding general election in said County; and it appearing from said Petitions considered in the aggregate, that more than twenty-five per cent (25%) of the number of voters in said County voting in said last preceding general election have joined in a request for an election for said Tuscaloosa County, Alabama, by signing said Petitions are now legally qualified to vote; and it further appearing that no election to determine the question set out in said Petitions has been held in said Tuscaloosa County, Alabama, within the last two (2) years prior to the 1st day of May, 1940, and that the terms of said Alabama Beverage Control Act have been fully complied with, I, Chester Walker, as Probate Judge of Tuscaloosa County, Alabama, do hereby call an election for said County to be held on Wednesday, May 1st, 1940, for the purpose of having the qualified voters in said County vote upon and determine whether or not alcoholic beverages shall be legally sold or distributed in said County. Said election is called under authority of Section Fifty-one (51) of the Alabama Beverage Control Act, Page 82 of Acts of Alabama of 1936 and 1937.

"Entered this 22nd day of March, 1940.

Chester Walker,

Probate Judge of Tuscaloosa County, Alabama."

The pertinent provisions of the Alabama Beverage Control Act, which is Act No. 66, H. 44, which became a law under Section 125 of the Constitution, on February 2, 1937, (General Acts, 1936-37, p. 40, 81) are found in Section 51 thereof and read as follows:

"Any County in the State may change its classification from wet to dry or from dry to wet, under this Act in the following manner: Upon the petition of twenty-five percent (25%) of the number of voters voting in the last preceding general election being filed with the Probate Judge of said County, said Probate Judge must call an election for said County to determine the sentiment of the people as to whether or not alcoholic beverages can be legally sold or distributed in said County * * *. After such election, there can be no other held in such County within a period of less than two (2) years."

At the outset, it might be well to point out that the statute is silent as to what allegations or averments, if any, the petition must contain. It likewise contains no direction as to how or by whom the following facts shall be ascertained or verified:

1. Whether or not the petition is signed by twenty-five per cent of the number of voters voting in the last preceding general election.
2. Whether or not such an election has been held in said county within a period of less than two years prior thereto.

In my opinion, the duty of ascertaining and verifying these facts is placed upon you, as Judge of Probate of Tuscaloosa County, the official with whom the petition must be filed, and the official charged under the act with the duty of calling the election.

"In the absence of any provision of law to the contrary, the duty of determining whether a petition presented is in accordance with the requirements of law, falls upon the officers to whom it is presented and who are to call the election. Accordingly, it has been held that a secretary of state, in performing the duties cast upon him by an initiative and referendum amendment to the constitution acts as a ministerial administrative officer; and that he is vested with power to examine the petitions presented to him to determine their sufficiency, * * *." 9 R. C. L. 996, Section 18.

It is further my opinion that the petition which was filed with you, a copy of which is hereinabove set out, was sufficient to confer jurisdiction upon you to ascertain and verify the above facts, and to call or order the election to be held, after you had ascertained or verified the same.

It must be conceded in the beginning that in a proceeding of this nature, before the official upon whom the duty of calling or ordering the election is placed has the authority to call or order the same, a petition therefor containing all the necessary allegations or averments to give jurisdiction to him, must be filed with him. **Tally v. Grider**, 66 Ala. 119; 20 C. J. 95, Section 78, notes 10, 12.

It becomes important, therefore, to determine whether or not the following are necessary jurisdictional averments which must be contained in the petition:

1. That the petition is signed by twenty-five per cent of the number of voters voting in the last preceding general election.
2. That no such election has been held in said county within a period of less than two years prior thereto.

In my opinion, neither of these facts need be alleged in the petition. As has been noted hereinabove, the statute does not specifically provide that the petition shall contain an averment of either of these facts. The failure of the Legislature to require the petition to contain the averment of these facts was not without good reason.

Considering the fact hereinabove numbered 1:

The absurdity of requiring an averment of this fact in the petition at once appears, as obviously the first and all subsequent signers of the petition, before it was signed by twenty-five per cent of the number of voters voting in the last preceding general election, could not truthfully say that they constituted twenty-five per cent of the number of voters voting in the last preceding general election at the time they signed the petition. Then, too, if an averment of such fact were required, could it be reasonably contended that this averment would preclude the judge of probate from inquiring into the accuracy of the averment? I think not. 9 R. C. L. 996, *supra*. Then, it could

serve no useful purpose, and there is no reason why it should be contained in the petition, the purpose of which, as obviously appears from Section 51, supra, is only to inform the judge of probate, whose duty it is to call the election, that the voters whose names are affixed thereto desire an election to be held to determine the question set forth in the petition.

A similar question was presented to the Supreme Court of Alabama in 1912 in the case of **Cook v. Court County Commissioners Walker County**, 178 Ala. 394, 59 So. 483. The question for a stock law election in a particular precinct in Walker County filed under the provisions of a statute which required a petition for such election to be signed by a majority of the bona fide freeholders of the precinct.

The petition was signed by sixty-nine persons who alleged that they were bona fide freeholders residing in Precinct No. 4 and owned a freehold estate in said precinct, but did not allege that they constituted a majority of the freeholders of said beat or precinct, and asked that an election be held to ascertain whether or not a majority of the qualified electors desired or favored a law prohibiting stock from running at large in said precinct. The judge found that they (the signers of the petition) constituted a majority of the bona fide freeholders residing in said precinct and ordered an election. The court speaking through Mr. Justice Mayfield said:

"While the petition does not in terms allege that a majority of the landowners signed the petition, and does not in terms allege that the petitioners have deposited money sufficient to defray the expenses of holding such election, it does show that the petition was signed by a great number of landowners; and the court found that they constituted a majority, as the statute requires, and that the petition had been filed as prescribed. Whether those signing constituted a majority of those qualified to sign such petition, and whether the amount of money deposited was sufficient, would also be matters prima facie for the court to decide; * * *."

This is peculiarly apt authority for the conclusion that it is not necessary for the petition presented to you to allege or aver that the signers thereof constituted twenty-five per cent of the number of voters voting in the last preceding general election.

The identical legal question here presented was before the Supreme Court of Illinois in the case of **The Town of Somonauk v. The People ex rel. Henry F. Hess et al.**, 178 Ill., 631, and later was considered by the Court of Appeals of Illinois in the case of **The People of the State of Illinois ex rel. Monroe Seals et al v. Louis Henderson, Town Clerk**, 201 Ill. App. 247. I quote from the opinion in each of these cases, respectively: In the Hess case it is stated:

"Nor is the objection tenable the petition is insufficient because it does not contain an averment the names of three-fourths of the voters residing in the territory of the proposed new town are appended thereto. Such an averment could not be truthfully made by any petitioner except the one whose signature would complete the requisite number and those who might afterwards sign, — a consideration which demonstrates the groundless character of the objection. That the requisite number of voters had joined in the petition is a preliminary fact for the determina-

tion of the board as affecting its jurisdiction to act. The petition for **mandamus** contained allegations of fact from which it would appear the petition to the board bore the signatures of the requisite number of voters, and also distinct affirmative averments to same effect. Transcripts of the record of the proceedings of the board, which were attached to the petition as exhibits thereto, disclosed that a committee, composed of members of the board appointed by the board for the purpose, verified the authenticity of the signatures of legal voters to the petition and ascertained the number thereof, and also the number of legal voters residing in the territory of the proposed new town, and made report thereof to the board, and it thus further appeared the names of three-fourths of said voters were subscribed to the petition. **The determination of this preliminary fact, though it involved the exercise of judgment on the part of the board and its members, was but a finding as to the existence of a fact necessary to be known to the board itself in order to determine whether a state of case existed calling upon it to act.**" (Emphasis supplied)

The opinion in the Henderson case reads in pertinent part:

"But two questions are urged here against the sufficiency of the petition:

"1. The petition on its face does not state that the signers thereon are equal in number to not less than one-fourth of the total votes cast in said town at the last election therein. ***"

"Section 4 of that part of chapter 43 known as the Local Option Law (J. & A. Section 4640), provides not only what the petition to have the question of whether certain political divisions shall become anti-saloon territory submitted to vote, shall contain, but provides that it shall be substantially in the form there given. There is nothing in that section which requires that the petition on its face shall show that the signers thereon are equal in number to not less than one-fourth of the total votes cast in the territory at the last election. Section 2 of that Act (J. & A. Section 4638) provides that such petition shall contain that proportion of such votes, but whether such petition contains the requisite number must be determined from a count of the signers by the clerk. **It is manifestly impossible for any signer when he signs a petition to know how many others will sign it, and unless when he does sign it there are then on it signatures in number not less than one-fourth of the total vote cast in such political subdivision at the last election, he would certify to a falsehood if he said there was.** *Town of Somonauk v. People*, 178 Ill. 631. There is nothing in *People v. Dillon*, 266 Ill. 272, in conflict with the *Somonauk* case, *supra*." (Emphasis supplied)

To like effect is the holding in the very recent case of *Akers v. Remington*, 115 S. W. (2d) 714, h. n. 4, decided by the Court of Civil Appeals of Texas in 1938. See also *In re: Bentley*, 291 N. Y. S. 207, 160 Misc. 706, h. n. 5.

At first blush, certain statements in the opinion by Mr. Justice Miller of the Supreme Court of Alabama in the case of *State ex rel Potts v. Court of County Commissioners of Lauderdale County*, 210 Ala. 508, 98 So. 562, appear to be opposed to the conclusion hereinabove reached. The question before the court was the legal sufficiency of a petition seeking an election to repeal a stock law in a particular precinct in Lauderdale County. The petition there considered was drawn in accordance with the provisions of Section 5882 of the

Code of Alabama of 1907, as amended, which provided the method for the calling of an election for the purpose of establishing a stock law in a particular precinct, and required a petition signed by one-fourth of the bona fide freeholders residing in the precinct, whereas, Section 5896 of the Code of Alabama, 1907, provided the proper method for the calling of an election for the repeal of an existing stock law in a particular precinct, and required a petition signed by a majority of the bona fide freeholders residing in the precinct. The only question before the court was whether or not a petition drawn under the provisions of Section 5882, as amended, *supra*, was sufficient to invoke the jurisdiction of the county governing body to call an election under the provisions of Section 5896, *supra*. The question of whether or not the petition had to contain an averment that the signers constituted the requisite number of bona fide freeholders was not before the court. Consequently, I do not consider the statements in the opinion, which seem to indicate that such an averment in the petition was necessary, to be controlling on this question in view of the positive holding to the contrary in the case of **Cook v. Court County Commissioners Walker County**, *supra*, and especially in view of the fact that said Cook case was not considered in the latter case and no attempt was there made by Mr. Justice Miller to overrule the same or depart from its holding.

Adverting now to the fact hereinabove numbered 2, i.e. that no such election has been held in said county within a period of less than two years prior thereto.

The absurdity of requiring an averment of this fact in the petition is equally apparent. The last election held in Tuscaloosa County on this matter was held pursuant to an order issued by you, as Judge of Probate, and the returns thereof were tabulated and the results certified as provided by law for county elections, which means that the original declaration of the result thereof was filed in your office. **Section 511, Code of Alabama, 1923**. The declared result of a general election is a matter of judicial knowledge. **Casey v. Bryce**, 173 Ala. 129, 55 So. 810. Courts take judicial notice of their own records. **Nashville, C. & St. L. R. R. v. Crosby**, 194 Ala. 338, 70 So. 7; **Terrell v. Nelson**, 199 Ala. 436, 74 So. 929; **Alabama Power Co. v. Goodwin**, 214 Ala. 15, 106 So. 239; **Quick v. McDonald**, 214 Ala. 587, 108 So. 529; **Jackson v. Chemical National Bank**, 215 Ala. 538, 112 So. 105; **Stephenson v. Stephenson**, 215 Ala. 545, 112 So. 119; **Snodgrass v. Snodgrass**, 217 Ala. 128, 115 So. 21; **Jobe-Rose Jewelry Co. v. City of Birmingham**, 235 Ala. 178, 178 So. 215; 23 C. J. 109, **Section 1917**. When judicial notice is taken of a fact, it need not be pleaded or proved. **Louisville & N. R. R. v. Shikle**, 206 Ala. 494, 90 So. 900; **Hodge v. Joy**, 207 Ala. 198, 92 So. 171; **Jobe-Rose Jewelry Co. v. City of Birmingham**, *supra*; 23 C. J. 58, **Section 1807**. Indeed, if an averment in a petition is inconsistent with judicial knowledge, it is negatived thereby. **State ex rel Glenn v. Wilkinson**, 220 Ala. 172, 124 So. 211, and cases therein cited.

Applying the above stated principles to the instant matter, it is readily seen that you, as judge of probate, had judicial knowledge of the fact that no such election had been held in Tuscaloosa County within a period of two years; that, consequently, it is wholly unnecessary and useless for the petition to contain an allegation or averment of that fact; and that, if the petition had contained such an allegation or averment, and it was contrary to your judicial knowledge, it would have been of no force and effect whatsoever.

What has been said hereinabove is not contrary to the conclusion reached by the Supreme Court of Alabama in **Savage v. Wolfe**, 69 Ala. 569. Here

again, in order to understand the full scope of the opinion in that case, it is necessary that there first be had a complete understanding of the facts. The petition, the legal sufficiency of which was before the court for consideration, was filed under the provisions of Act No. 204, approved March 19, 1875 (General Acts, 1874-75, p. 276) Section 1 of said set out in positive language the averments to be contained in a petition seeking an election for the establishment of prohibition in a particular territory. Section 11 thereof detailed the method of securing an election to revoke prohibition in a particular territory where in it had been previously established in an election called in accordance with the provisions of Section 1. It reads in pertinent part:

"Section 11. Be it further enacted, That after such probate judge shall have made his order prohibiting the sale or giving away of vinous or spirituous liquors, within any city, town, village, church, school house, public works, or other place, and any citizen being a freeholder within such limits desires to have the order revoked, he may do so by petition to the judge of probate in the same manner as in the first instance, after the expiration of twelve months from the prior election."

The petition was filed under Section 11 of the act for a revocation of an order of prohibition. As stated in the opinion, the petition for revocation was sworn to and filed on January 10, 1881, and showed on its face that the first election which resulted in prohibition was held on January 19, 1880; nine days less than twelve months before the second petition was filed. After noting these facts, Mr. Justice Stone stated:

"This (the fact that the first election had been held less than twelve months before the second petition was filed) appears on the fact of the petition, and is fatal to it. It failed in this important jurisdictional averment, and failed to put this statutory jurisdiction of the judge of probate into exercise."

It is this statement which it is contended makes it necessary that an allegation or averment be made in the petition as to the time within which a prior election was held. However, I am not impressed with this contention. Mr. Justice Stone had previously stated:

"But there is a limitation on this right to make this second petition. It can only be 'after the expiration of twelve months after the prior election.' Such is the express language of the statute."

It, therefore, appears that the "jurisdictional averment" to which Mr. Justice Stone referred was the "jurisdictional averment" of the statute rather than that in the petition, and the petition there filed showed on its face that this "jurisdictional averment" of the statute had not been complied with. Consequently, I am of the opinion that nothing in **Savage v Wolfe**, supra, is opposed to the conclusion herein reached that an allegation or averment as to the time within which a prior election was held is not necessary in the petition.

Your order or call for the election, a copy of which is set out hereinabove, shows affirmatively that you, as judge of probate, ascertained both of these facts, i. e., (1) That the petition was signed by twenty-five per cent of the number of voters voting in the last preceding general election,

and (2) that no such election had been held in said county within a period of less than two years prior thereto.

As pointed out above, this you had the authority and duty to do. In my opinion, the petition and order are legally sufficient to authorize the holding of the election sought by the petition, which you have ordered to be held on May 1, 1940. Cf. *Gantt v. Court of County Commissioners of Covington County*, 210 Ala. 125, 97 So. 129; *McCormick v. Board of Revenue of Marshall County*, 223 Ala. 453, 137 So. 171; *Southern R. R. Co. v. Webb*, 232 Ala. 324, 167 So. 729; *Smith v. Board of Education of Cullman County*, 236 Ala. 649, 184 So. 475.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 8, 1940.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Traveling Expenses—

Assistant Examiners of Public Accounts not required to comply with the provisions of Section 820 of the Code of Alabama, 1923, in filing claims for traveling expenses, before warrants may legally be issued for such expenses.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 25, 1940, in which you request my opinion as follows:

"The Legislature of Alabama, Extra Session, 1933, passed Act No. 121, House Bill No. 390, with reference to fixing and limiting the amount which may be expended and allowed by assistant examiners of public accounts for travelling and other expenses, when they are away from their homes on official business.

"We are attaching the form used by the assistant examiners in submitting their expense accounts for payment, and have filled in this form. There is also attached to this expenses form signed receipts for all the items, with the exception of the twelve days' expense at \$3.00 per day, total \$36.00. Some of the expense accounts also include mileage, at 5c per mile, when the assistant examiner uses his personal car on official business.

"The voucher attached to the expense account is properly signed by the Chief Examiner of Public Accounts and the Director of Finance.

"Is the Comptroller legally authorized to accept these expense claims and issue warrants for same, or must these claims be supported by receipts for the expenditure of the \$3.00 per day before warrant can legally be issued in payment thereof?"

Before answering your inquiry, I deem it advisable to review the history of the various statutory provisions relating thereto, and the construction placed thereon by successive Attorney Generals, Chief Examiners of Public Accounts, Governors, State Auditors, and the successors of the State Auditor in the matter of issuing warrants on the State Treasury, State Comptrollers.

In 1911, Act No. 481, H. 18, approved April 18, 1911 (General Acts, 1911, page 490), dealing with the division or department of Examiners of Public Accounts, contained the following proviso in Section 2 thereof, which amended Section 547 of the Code of 1907, as it had been theretofore amended:

"The Chief Examiner of Public Accounts and each Examiner of Public Accounts shall receive compensation at the rate of \$1,800 per annum payable monthly, and an additional sum, computed on a monthly basis of \$4.00 per day for expenses, and in addition thereto all transportation expenses incurred in going and returning in filling assignments and going to and returning from their homes. The accounts must be itemized and sworn to, and upon approval by the governor the auditor shall draw a warrant on the treasury for the same."

I know of no Attorney General's opinion written on the question of whether or not claims for the \$4.00 per day had to be itemized, verified by affidavit, with vouchers therefor attached, before the same could be legally paid, prior to the one hereinafter discussed. However, I am informed that it was construed by successive Chief Examiners of Public Accounts, Governors, and State Auditors as allowing a flat \$4.00 per day, without the necessity of itemization, with vouchers therefor attached.

In 1919, the Legislature passed Act No. 151, H. 227, approved February 17, 1919 (General Acts, 1919, page 145), Section 1 of which reads as follows:

"Section 1. That all officers and employees who travel at the expense of the State, shall before warrants issue for such expenses, file with the State auditor an itemized statement of such expenses, verified by affidavit, with vouchers therefor attached, where any item amounts to fifty cents or more, and it shall be unlawful for the auditor to draw his warrant on the State treasurer for such traveling expenses until such itemized statement, verified by affidavit, with vouchers attached, is filed with him. Provided further that where the law provides a specific allowance for traveling expenses, only to so much thereof shall be paid by the State as is actually expended, and such persons shall file their statements of such expenses as herein provided."

Almost immediately thereafter, an opinion of the Attorney General was requested as to whether or not Act No. 151, supra, had the effect of requiring claims for the \$4.00 per day, allowed by Act No. 481, supra, to be itemized, verified by affidavit, with vouchers therefor attached, before the Auditor

was legally authorized to draw his warrant on the State Treasury in payment of the same. The then Attorney General's opinion in answer thereto was rendered to Hon. H. F. Lee, State Auditor, Capitol, under date of February 26, 1919, Biennial Report of Attorney General, 1918-20, page 104, and reads in pertinent part as follows:

"Referring to your inquiry as to the application of an act approved February 17, 1919, to require State officers and employees traveling at the expense of the State to file vouchers, etc. (Acts 1919, p. 145, * * * (2) to Examiners of Accounts, who under an act approved April 18, 1911 (Acts of 1911, p. 490) receive for their services compensation 'payable monthly, and an additional sum, computed on a monthly basis of \$4.00 per day for expenses, and in addition thereto all transportation expenses incurred in going and returning in filling assignments and going from and returning to their homes.' * * *

"And with reference to the Examiners of Accounts it seems that the law does not provide a specific allowance for traveling expenses, but allowed them (a) \$4.00 per day for expenses computed on a monthly basis and (b) transportation expenses, so that I am of the opinion that the Examiners of Accounts are not required to follow the requirements of the Act of February 17, 1919, with reference to the expense allowance of \$4.00 per day, but are required to respect said act with reference to transportation expenses."

At the same session of the Legislature at which Act No. 151, supra, was passed, but after the passage of Act No. 151, supra, and after the rendition of the Attorney General's opinion to Mr. Lee, supra, and on, to wit, September 29, 1919, two separate acts creating a Department of Examiners of Accounts, identical in all respects, were approved by the Governor. They are Act No. 554, S. 521, approved September 29, 1919 (General Acts, 1919, page 810) and Act No. 663, H. 855, approved September 29, 1919 (General Acts, 1919, page 963). Subsection (5) of Section 4 of each of said acts reads as follows:

"(5) The chief examiner of accounts shall receive compensation at the rate of twenty-seven hundred (\$2,700) dollars, per annum and every assistant examiner of accounts shall receive compensation at the rate of twenty-four hundred (2,400) dollars per annum payable monthly, and an additional sum each, computed on a monthly, basis of four dollars (\$4.00) per day for expenses, and in addition thereto all transportation expenses incurred in going and returning in filling assignments and going to and returning from their homes. The accounts must be itemized and sworn to, and upon approval by the Governor the Auditor shall draw a warrant on the Treasury for the same."

It is to be noted that Subsection (5) of Section 4 of each of the acts last hereinabove referred to is identical on the question of the allowance for expenses with the provisions of Act No. 481, supra. Subsection (5) of Section 4 of the two acts last hereinabove referred to was codified in the Code of 1923 as Section 741, without change, and Section 1 of Act No. 151, supra, was codified as Section 820 of the Code of Alabama, 1923, without change.

There was no further legislation applicable to this matter until in 1933. In the interim, all Assistant Examiners of Public Accounts were paid a flat \$4.00 per day, and their claims therefor were not required to be itemized,

verified by affidavit, with vouchers therefor attached. Then in 1933, Act No. 121, H. 390, approved April 10, 1933 (General Acts, 1933, page 114) was passed. This act, omitting the exacting clause and the proviso for it to become effective immediately upon its passage and approval, reads as follows:

"An Act to fix and limit the amount which may be expended and allowed by assistant examiners of public accounts for traveling and other expenses, and to provide that they shall not draw any expenses or allowances for expenses or transportation except when they are away from their homes on official business. * * *

"Section 1. The Assistant examiners of public accounts shall be reimbursed their actual transportation expenses and in addition thereto shall be paid the sum of Three Dollars (\$3.00) for traveling expenses while away from their homes on official business, provided that they shall not draw any sum for expenses except when away from their homes of official business.

"Section 2. All laws and parts of laws in conflict herewith are expressly repealed. * * *" (Emphasis supplied)

It is my information that the then Chief Examiner of Public Accounts and the then State Comptroller, who, by legislation enacted in 1932, succeeded the State Auditor as the official charged with the duty of drawing warrants against the State Treasury and their successors thereafter paid Assistant Examiners of Public Accounts a flat \$3.00 per day while they were away from their homes on official business, without requiring claims therefor to be itemized, verified by affidavit, with vouchers therefor attached.

The only opinion rendered by the Attorney General on this question is the opinion to Mr. Lee, *supra*, rendered in 1919.

Such is the history of the statutory law applicable to this matter and the administrative construction given thereto.

However, in my judgment, it is not necessary to look further for an answer to your inquiry than the provisions of Act No. 121, *supra*, which is the last expression of legislative will on the subject. It very clearly provides that in addition to actual transportation expenses, Assistant Examiners of Public Accounts shall be paid the sum of \$3.00 for traveling expenses while away from their homes on official business, and repeals all laws and parts of laws in conflict therewith. If the provisions of Section 820, *supra*, were held to be applicable to the expense allowances of Assistant Examiners of Public Accounts, instead of them being paid the sum of \$3.00 for traveling expenses while away from their homes on official business, for which Act No. 121, *supra*, very clearly provides, they would only be paid so much thereof (i. e., of the \$3.00) as they proved was actually expended, by an itemized statement of such expenses, verified by affidavit, with vouchers therefor attached, when any item amounted to fifty cents or more. Thus, it can be readily seen that the two provisions are in irreconcilable conflict, i. e., Act No. 121, *supra*, is in irreconcilable conflict with the provisions of Section 820, *supra*. Act No. 121, *supra*, being the last expression of the legislative will on the subject, must control. While repeal by implication is not favored in the law, if statutes are in irreconcilable conflict, the later act, in so far as it conflicts with the former act, is the law, and the former act, to the extent

of its conflict with the later act, is repealed thereby. **Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co.**, 223 Ala. 477, 136 So. 824, and cases collated in the 18 Alabama Digest, "Statutes", Key Nos. 158 and 159.

The premises considered, you are advised that the provisions of Section 820, supra, requiring an itemization of claims for traveling expenses, verified by affidavit, with vouchers therefor attached, do not apply to claims of Assistant Examiners of Public Accounts for the "sum of three dollars (\$3.00) for traveling expenses while away from their homes on official business." In my opinion, the sample form used by the Assistant Examiners of Public Accounts in submitting their claims for traveling expenses, which is attached to your letter of inquiry and which is summarized therein, is made in full compliance with the law and is sufficient to legally authorize the issuance of a warrant by you, as State Comptroller, upon the State Treasury in payment thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 9, 1940.

Hon. Wm. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Licenses—Motor Vehicles—

Person purchasing a new motor vehicle during the month of October required to purchase appropriate motor vehicle license for the then remaining portion of the license year, in addition to license for the succeeding license year.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 28, 1940, in which you request my opinion as follows:

"In view of the Motor Vehicle License Act No. 212 approved August 8th, 1939, changing the due and delinquent date from September 30th-October 1st to November 14th-November 15th, will the purchaser of a new automobile during the month of October be permitted to buy a license tax for the coming year or will it be necessary for such purchaser to buy two months tag in the present year and in November buy a tag for the coming year? It has been pointed out that if a purchaser should buy a tag—say in October, 1940, he would then have a thirteen and one-half months to operate on this tag. There seems to be some doubt as to what type of tag should be sold under this condition.

"We would like to have this matter cleared."

Act No. 212, H. 104, approved August 8, 1939 (General Acts, 1939, p. 363) to which reference is made in your letter of inquiry, amended Schedule 158.17 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act to read as follows:

"Schedule 158.17. All motor vehicle licenses under this act shall become due on the 15th day of November of each year, and are delinquent after that date; but they shall be issued on application at any time within 45 days prior to that date."

In an opinion rendered to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 8, 1939, Quarterly Report of Attorney General, Vol. XVII, p. 189, construing Act No. 212, supra, it was stated:

"The act, supra, does have the effect of changing the license year on motor vehicle licenses from October 1-September 30, which was the license year prior to its passage, to November 15-November 14."

If a person purchases a new motor vehicle during October of the then current year, the motor vehicle license for which he is then liable is the license for the then current license year, though, under the provisions of Act No. 212, supra, he is also permitted, if he so desires, to purchase his license for the next succeeding license year, which, as pointed out above, becomes due on November 15. Certain it is that the purchase of a motor vehicle license during October of the then current license year for the next succeeding license year gives to the purchaser thereof no rights thereunder until the beginning of the succeeding license year. Of course, the person purchasing a new motor vehicle in October of the then current license year would not be required to purchase a full year's license for the then current license year but would only be required to purchase a license for the remaining portion of the then current license year. As to new and used automobiles and trucks, the license could be purchased on a monthly declining basis. As to all other motor vehicles, the proper license would be the so-called half-year license provided for by Schedule 158.13 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act. Opinion to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, Quarterly Report of Attorney General, Vol. XIV, p. 269, and authorities therein cited. In this connection, your attention is also called to the following statement from the opinion to Judge Price, supra:

"Now that the license year is from November 15-November 14 instead of from October 1-September 30, as formerly, the months would begin on the fifteenth instead of the first, * * *."

Recapitulating briefly, if a person buys a new motor vehicle in October of any license year, he is required to purchase appropriate license therefor for the remaining portion of the then current license year, which license expires on November 14, and he must also purchase a license therefor for the next succeeding license year, which begins on November 15, if he desires to operate the same on or after that date, which license may be purchased at any time within forty-five days prior to that date.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 10, 1940.

Hon. Allen Stewart,
Sheriff, Autauga County,
Prattville, Alabama.

Primary Elections—Candidates—Names on Ballots.

Under the provisions of Section 9 of Act No. 56, H. 73, approved February 25, 1931 (Gen. Acts 1931, p. 73), a person's name may not be printed on the official ballot unless such person is legally qualified to hold the office for which he is a candidate.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion bearing date of April 8, 1940, which reads as follows:

"A condition has arisen over here, about which I deem it very necessary for you to give me ruling. It is this,—A qualified voter of Autauga County announced himself and qualified as a candidate for a Member of the Board of Education from the Autaugaville District.

"It now develops that this candidate is disqualified from becoming a candidate in the Autaugaville District, because he does not reside in that District. The Executive Committee of this County, by letter under this date, advises me that he is disqualified from being a candidate for the Board of Education from said Autaugaville District, and they have advised him of that fact. That he accedes to the ruling of the County Committee, and with the Executive Committee he files a statement in writing withdrawing as a candidate for the Board of Education and asking that his name be stricken from the ballots which have been, or will be prepared for the May 7th Primary Election. A copy of this statement has been filed with me.

"I am informed that the ballots for the May 7th primary have been made up and printed, and the question is, whether his name can be stricken from the ballots, or will the ballots remain as they are and used in the May 7th primary just as they are.

"Please advise me at an early date, as I find no authority authorizing me to eliminate this candidate's name from the ballots."

You state in the above request that the person in question concedes the point that he is not legally qualified to hold the office for which he is a candidate, and has requested in writing that his name be withdrawn as a candidate.

Your attention is called to Act No. 56, H. 73, approved February 25, 1931, (Gen. Acts, 1931, p. 73) which act is commonly referred to as the Primary Election Act of 1931, and reads in pertinent part as follows:

"Section 9. The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate, ***"

It affirmatively appears from the above quoted portion of Section 9 that a person who is not legally qualified to hold the office for which he is a candidate shall not have his name printed on the official ballot.

You are advised that in my opinion Section 9, supra, together with the written request of the candidate that his name not appear on the ballot, is your authority to strike such person's name from the official ballot. I suggest that if the ballots have already been printed, that you simply instruct the printer to blank out such person's name from the ballot so that it will not be legible.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 15, 1940.

Hon. A. H. Collins,
Superintendent of Education,
State of Alabama,
Capitol.

Revolving Fund—Construction of Section 59 of the School Code of Alabama, 1927—purposes for which 80% portion thereof may be used.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for an official opinion under date of March 28, 1940, as follows:

"Your opinion is requested on the following questions?

"1. Is it legal for the State Board of Education to pay for teachers' registers, school bus drivers' registers, and other record and report forms furnished to county boards of education for use in rural schools, from the eighty per cent portion of the Revolving Fund referred to in Section 59 of the Alabama School Code of 1927?

"2. Is it legal for the State Board of Education to pay the salary and expenses of a person serving as a school architect or a school transportation supervisor from the eighty per cent portion of the Revolving Fund referred to in Section 59 of the Alabama School Code of 1927, if the

services of such employee are rendered exclusively for bettering conditions in rural schools?"

I answer both of your inquiries in the affirmative, subject to conditions hereinafter set out.

Section 59 of the Alabama School Code of 1927 is as follows:

"59. Equalization of School Facilities, Revolving Fund.—The State Board of Education is specifically charged with the duty of equalizing public school facilities throughout the State, in so far as it may be practicable; and in order to make it possible to increase the length of school terms in rural districts, and to care for that and other worthy purposes for which no adequate appropriation has been made, the said State Board of Education shall expend so much as it may deem proper of the amount set aside annually by legislative enactment as a revolving fund for the use of the State Board of Education, provided at least eighty per cent of the amount appropriated, if used, shall be expended for lengthening of public school terms and otherwise bettering conditions in rural schools, and that any unexpended balance at the end of any fiscal year shall be placed to the credit of the General Educational Fund."

In construing Section 25 of the School Code of 1927, which section is similar in all material respects to Section 59, *supra*, the Supreme Court in the case of *McElderry v. Abercrombie*, 213 Ala. 289, 104 So. 671, said:

"The term 'revolving fund,' as therein used, implies the passing of the fund from one use to another in furtherance of the general purpose. **Eighty percent, must be expended in 'lengthening public school terms and otherwise bettering conditions in rural schools.'** Even this is general in leaving to the board of education the determination of the objects to which the fund would be devoted in 'bettering conditions,' etc.

"As to the 20 per cent, there appears no limitation on its use except 'other worthy purposes for which no adequate appropriation has been made.' It appears that, in view of the reorganization of the entire educational system, the expense as well as scope of official labor and responsibility, being yet somewhat undetermined and depending to a degree upon the future activities of the board itself, the purpose was to vest in the board of education, including the governor and members named by him, a broad discretion in furtherance of the general ends in view. The complaining party has the onus of showing the use of the fund was outside this discretion." (Emphasis supplied)

It is, therefore, my judgment, based upon the opinion of the Supreme Court in the case of *McElderry v. Abercrombie*, *supra*, that the State Board of Education may pay for teachers' registers, school bus drivers' registers and other record and report forms furnished to county boards of education and may also pay the salary and expenses of a person serving as a school architect or a school transportation supervisor from the 80 per cent portion of the revolving fund referred to in Section 59, *supra*, if in the opinion of the said board, the same will work to better the conditions in the rural schools and no adequate appropriation has been made for such purposes.

In so far as certain expressions in an opinion of this office addressed to Hon. J. A. Keller, Superintendent of Education, dated August 11, 1937, Quarterly Report of Attorney General, Vol. VIII, p. 78, might conflict with this opinion the same are modified to conform hereto.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 15, 1940.

Hon. G. A. Ward, Judge,
Inferior Court, Geneva County,
Geneva, Alabama.

Geneva County—Inferior Court—Probation—

Inferior Court of Geneva County may suspend execution of sentence of person convicted therein and grant probation to said person under the authority of Act No. 278, S. 198, approved August 24, 1939 (General Acts of 1939, page 424), notwithstanding that indictment upon which said person was tried in said Inferior Court, after transfer from the Circuit Court under authority of Section 9 of Act No. 538, H. 1009, approved September 16, 1939 (Local Acts of 1939, page 329) was returned by the grand jury of the county prior to the effective date of said Act No. 278 (the probation act), viz., August 24, 1939.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of April 3, 1940, in which you request my opinion as follows:

“Will you kindly advise me concerning Section 1 of an Act of the Legislature of 1939 approved August 24, 1939, No. 278, which Section, or a portion thereof, provides as follows:

“‘Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court, after a plea of guilty, or after the returning of a verdict of guilty by the jury, or the rendition of a judgment of guilty by the Court may suspend execution of sentence and place the defendant on probation or may impose a fine within the limits fixed by law and also place the defendant on probation.’

“The specific question that I desire an opinion from you on is where a defendant was indicted prior to the approval of this Act on August 24, 1939 does the Circuit Courts or the Judge thereof or an Inferior Court, from which an appeal lies directly to the Court of Appeals or the Su-

preme Court, or the Judge thereof, have authority to suspend the execution of the sentence and place the defendant on probation?"

In my opinion, your inquiry must be answered in the affirmative.

Section 9 of the act creating a Court of Record to be known as and called the Inferior Court of Geneva County (Act No. 538, H. 1009, approved September 16, 1939, Local Acts of Alabama, 1939, page 329) provides:

"That on and after the effective date of this Act, it shall be the duty of the presiding Judge of the Circuit Court of Geneva County, Alabama, to make an order transferring to this Court all cases pending on the docket of said Circuit Court wherein the defendants are charged with the commission of misdemeanor, and thereafter each and every indictment returned by a grand jury of Geneva County against persons charged with the commission of misdemeanor shall be placed on the docket of this Court by the Clerk for trial and disposition, and no order with respect to such indictments by the Circuit Court is necessary."

"Section 10 of said act, supra, provides in part:

"* * * and in cases of conviction the defendant * * * may at his election appeal from such conviction to the Circuit Court or to the Court of Appeals of the State of Alabama."

Section 1 of the so-called "probation act" (Act No. 278, S. 198, approved August 24, 1939, General Acts of Alabama, 1939, page 434) provides in part:

"* * * Courts of Record from whose judgments appeal lies directly to the Court of Appeals or the Supreme Court, subject to the provisions and conditions hereinafter provided, may suspend execution of sentence and place on probation any person convicted of crime in any court exercising criminal jurisdiction. * * * Except in the case hereinabove provided, * * * inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court, **after a plea of guilty, or after the returning of a verdict of guilty by the jury, or the rendition of a judgment of guilty by the court** may suspend execution of sentence and place the defendant on probation or may impose a fine within the limits fixed by law and also place the defendant on probation." (Emphasis supplied)

Section 7 of said probation act provides:

"That this act shall not authorize the suspension of sentence and probation in the case of any defendant whose sentence began prior to the effective date hereof."

Section 1 of said act authorizes the suspension of sentence and granting of probation, inter alia, by Inferior Courts from whose judgments an appeal lies to the Supreme Court or Court of Appeals (as is the case of the Inferior Court of Geneva County) to persons convicted of crime therein. The purpose and effect of Section 7, quoted supra, was to prevent the release of persons from sentences imposed prior to the effective date of the act.

Reading all of the pertinent provisions of the acts together, it is my opinion that, although the defendant was indicted by a grand jury prior to

the effective date of the probation act, supra, probation may be granted to him by the Inferior Court of Geneva County upon his conviction therein of the offense charged in said indictment, upon a day subsequent to the effective date of said probation act, that is to say, subsequent to August 24, 1939.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 16, 1940.

Hon. W. A. McKay, Judge
Civil and Criminal Court,
Autauga County,
Prattville, Alabama.

Witness fees—Witnesses in the Civil and Criminal Court of Autauga County are entitled to the same fees and allowances as witnesses in the Circuit Court.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion, dated April 6, 1940, which is as follows:

"Re: Price Per Diem — Witnesses.

"I would thank you to render an opinion on the price per diem to be paid witnesses in this, the Autauga County Civil & Criminal Court."

In my opinion, the witnesses in the Civil and Criminal Court of Autauga County are entitled to the same fees and allowances as witnesses in the Circuit Court.

Section 18 of Act No. 158, H. 548, approved June 27, 1935 (Local Acts, 1935, page 82), provides in pertinent part as follows:

"Section 18. Witnesses shall be entitled to the same fees and mileage as are now allowed by law for witnesses in the Circuit Courts in said County, * * * ."

The witnesses in the Circuit Court are entitled to the following fees and allowances, as provided by Section 3762 of the Code of Alabama, 1923, as amended by Act No. 105, S. 141, approved October 19, 1932 (General Acts, 1932, page 102), and Section 7233 thereof, which read respectively as follows:

"Section 3762. Witnesses in criminal cases are entitled to seventy-five cents per day and five cents for each mile to and from their residence by the route usually traveled, and all necessary ferriages and toll."

"Section 7233. Witnesses are allowed one dollar and fifty cents per day in civil cases; also five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and toll bridges, whether attending under subpoena, or at the request of the party."

The premises considered, it is, therefore, my opinion that in criminal cases, witnesses in your court should be paid seventy-five cents per day and five cents per mile to and from the residence by the route usually traveled, and all necessary ferriages and tolls; and in civil cases, one dollar and fifty cents per day and five cents per mile for each mile to and from their residence by the usual traveled route, and all necessary ferriage, tolls of turnpikes and toll bridges, whether attending under subpoena, or at the request of the party.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 16, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Vending Machine—Licenses—

Machines licensed under Schedule 154 of the Revenue Laws of 1935, as amended by Act No. 398, H. 827, approved September 13, 1939 (General Acts, 1939, p. 519) may be transferred from one county to another without procuring additional license.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 2, 1940, in which you request my opinion as follows:

"One Argen Thompson owned and operated in Colbert County, Ala. a vending machine or slot machine on which a license was required by state law and he purchased and paid for a license in Colbert County, Alabama, to operate said machine in Colbert County. During the same

license year, Thompson moved said vending machine or slot machine into Franklin County, Alabama and operated said machine in Franklin County, but did not pay for or secure a license in Franklin County to operate said machine. Was he required to secure a license in Franklin County in addition to the license he secured in Colbert County in order to operate said machine in Franklin County during the same license year? Please let me have your opinion."

I assume for the purpose of answering your inquiry that the vending machine in question is one of the machines upon which license is imposed by Schedule 154 of the Revenue Laws of 1935, as amended by Act No. 398, H. 827, approved September 13, 1939 (General Acts, 1939, p. 519).

Schedule 154, as amended, provides as pertinent as follows:

"Schedule 154. **For each machine for vending gum, candy, cigarettes, milk, soft drinks, or other articles, or on which a person is weighed, or on which music is played:** Where a machine is operated by pennies, \$1.00; where a machine is operated by nickel or coins of larger denominations \$8.00. * * * **The privilege license** required by law or the vending machine license issued to cover vending machines **shall be securely affixed in full view to each such vending machine** before said machine is placed in operation or use. * * *" (Emphasis supplied).

It appears from the above quoted excerpt from Schedule 154, as amended, that the license is imposed upon the vending machine and not upon the owner or person in whose place of business it is located for the privilege of operating such machine. Cf. Opinion to Hon. E. W. Long, Judge of Probate, Walker County, under date of November 21, 1931, Biennial Report of Attorney General, 1930-32, page 577; **City of Birmingham v. Merchants' Cigar & Candy Co.**, 235 Ala. 204, 178 So. 220.

There is no requirement in Schedule 154, as amended, that an additional license shall be paid if the machine licensed be moved to another county. All that is required is that the machine be licensed, the cost of the license being the payment of the prescribed amount to the State and one-half thereof to the county, as provided by Section 350(b), *infra*.

In my opinion, it is clear that the Legislature intended this, and this only, for upon examining the other schedules of Section 348 of the Revenue Laws of 1935 where it is intended that a license be paid in more than one county, I find the Legislature expressing itself quite clearly to that effect. Instance the following subsections or schedules showing clearly the legislative intent to require additional county licenses:

Schedule 25. Persons engaged in the business of making bonds: "The payment of the license required by this schedule shall authorize the doing of business only in the town, city, or county where paid."

Schedule 44. Reporting on credits: Fifty Dollars (\$50.00) "to each county in which such person maintains an office or established place of business."

Schedule 73. Traveling dealers in horses, mules or motor vehicles: "Five Hundred Dollars (\$500.00) in each and every county in which they do business."

Schedule 81. Persons selling or delivering lightning rods: "One Hundred Fifty Dollars (\$150.00) for each county in which they sell or deliver said articles."

Schedule 90. Person engaged in the business of selling or soliciting orders for the sale or purchase of mimeograph, duplicating machines, etc: " * * * such license shall not authorize such agent or dealer to do business in any other county than that in which the license is issued, but if such agent or dealer shall do business in any other county than that in which he has secured the license above provided, he shall pay an additional license in each such county where he solicits business of one-fourth of above schedule."

Schedule 93. Selling tombstones: Five Dollars (\$5.00) "for each county in which he sells * * * such tombstones."

Schedule 105. Photograph galleries: "The payment of the license required in this schedule shall authorize the doing of business only in the town, city, or county where paid."

It is my opinion that if the Legislature had intended to require the imposition of an additional state or county license for each county in which the vending machine was taken, it would have expressed itself clearly and unequivocally to that effect just as it did in the schedules enumerated, and in the many other schedules which might have been enumerated.

The Legislature clearly has a right to establish the units of classification respecting the territory to be covered by the license levied and it may make the state a unit, or it may make the counties separate units and require that a state license be paid for each unit, but in the absence of special provision for such units, it is my opinion that the unit of classification for state license is coextensive with the area of the state. Cf. *Patterson v. State*, 116 Ala. App. 483, 79 So. 157; *Peoples Auto Co. v. State*, 23 Ala. App. 7, 121 So. 907, cert. den. 219 Ala. 280, 121 So. 908.

It is my opinion, therefore, that Schedule 154, as amended, contemplates but one state and one county license and that there is no requirement that an additional state or county license be affixed to a vending machine transferred to another county.

Section 350(b), which provides as follows:

"(b) There is also hereby levied for the use of each county in the State a license or privilege tax upon each person, firm or corporation engaged in, or who shall carry on any of the occupations, business, professions, or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty percent of the State license or privilege tax, except as herein otherwise provided."

does not in any way mitigate against the conclusion hereinabove reached. It will be noted that the license levied thereby for the use of the county is only levied where a like state license is imposed—the Legislature merely providing that where a state license is imposed in a particular county, a license of fifty per cent of the amount of the state license so levied is im-

posed for the benefit of the county. It is clear that Subsection (b) of Section 350, supra, does not attempt to levy a license for a county where no state license is imposed.

The opinion rendered under date of June 27, 1934, to Hon. J. R. Gamble of the State Tax Commission (Biennial Report of Attorney General, 1932-34, page 563) is not in conflict with the above conclusion, having been based on a prior statute, now obsolete. The Gamble opinion is hereby superseded and overruled.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 17, 1940.

Hon. Wm. A. Conrad,
Clerk of the Circuit Court,
Mobile County,
Mobile, Alabama.

1. In cases where service is to be made by publication, a sufficient amount of money must be deposited with the clerk to cover the expense of such publication, Section 9454, Code, 1923.

2. "Notice of attachment and levy" as requested by Section 6179, is in effect "service" and clerk must require deposit of money in sufficient amount to cover cost of publication of such notice.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 4, 1940, in which you request my opinion as follows:

"I respectfully request Your Honor's opinion on the following questions listed below in reference to Section 6179 of the Code of Alabama of 1923.

"If the newspaper requires that the cost of the advertisement as provided for in Section 6179 of the Code of Alabama of 1923 be paid or guaranteed before first publication and the plaintiff, his attorney, or agent declines and refuses to pay or guarantee payment before first publication:

"1. Is the clerk, who is on a salary, required to proceed with said advertisement and pay for same out of his salary even though plaintiff, his attorney, or agent has declined and refused to pay or guarantee payment before the first publication?

"2. Would the clerk, who is on a salary, be permitted to proceed with said publication and charge the advertisement fee to the County?"

My answer to both of your questions is in the negative.

I call your attention to Section 9454, Code of Alabama, 1928, Michie, which is as follows:

"9454. Moneys deposited with officers necessary for postage, publication, etc.—In all cases where service is to be made by publication or registered mail, a sufficient amount of money must be deposited with the clerk, register, justice of the peace, or judge, to cover the expenses of such publication, or the postage and registration fee, as the case may be."

The question might arise whether or not the provisions of Section 9454, supra, apply to the provisions of Section 6179, Code of Alabama, 1928, (Michie). This section is as follows:

"6179. Notice to nonresident defendant. — When an attachment is sued out against a nonresident of the state, the writ shall be returned to the clerk of the court as soon as levied upon the property of the defendant, and thereupon the clerk shall cause a notice of the attachment and levy on the defendant's property to be advertised, once a week for three successive weeks, in some newspaper, a copy of which must be sent by mail to the defendant if his residence is known or can be ascertained; and when such publication is perfected, the case shall stand for trial at any time after the expiration of thirty days thereafter."

It is my opinion that the notice of the attachment and levy on the non-resident defendant's property which must be advertised for three successive weeks in a newspaper, a copy of which must be sent by mail to the defendant under Section 6179, supra, is tantamount to a service by publication or registered mail, as those words are used in Section 9454, supra.

It is, therefore, my opinion that you must require a deposit of a sufficient amount of money to cover the expense of such publication or postage and registration fee before you cause the notice to be published and mailed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 17, 1940.

Hon. W. W. Malone, President,
City Board of Education,
Athens, Alabama.

Schools—

Use of bonds accruing from the sale of real property, livestock, equipment and farm produce of State Secondary Agricultural School

Demonstration Farm, after payment of expenses of sale, etc., discussed.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 24, 1940, in which you request my opinion as follows:

"At the last meeting of the City Board of Education of Athens I was requested to obtain from your office an opinion on the following matter:

"The Legislature passed an Act September 21, 1939, found on page 881 of General and Local Laws providing for the sale of lands belonging to the state used as demonstration farms and that the proceeds of the sale of said farms are to be used as provided by section four of that Act.

"Our situation is this, our City Board of Education will be entitled to all the proceeds of the sale of the demonstration farm at Athens less expenses of sale, etc. We have three school plants: the Elementary School, the Junior High School, and the Senior High School.

"The Elementary Schools and the Junior High School buildings are located in the north portion of our town and the Senior High School buildings are located in the southern portion of the town.

"It becomes necessary to repair the Elementary School building by adding a room or two and doing some other necessary things in connection with this building.

"At the Senior High School building we have erected a football stadium, a WPA project, which is almost completed. We find, however, that it is necessary to add an additional unit or two to the stadium in order to complete it, but we do not have the money.

"The school board desires to know: (1) When the demonstration farm at Athens has been sold, can our school board use the proceeds for the purpose of repairing the Elementary School building by adding a new room or two and doing any other necessary repairs? (2) Can our school board use the proceeds of the sale of said farm in repairing any of our school buildings or erecting new buildings if necessary? (3) Can our school board use any of said funds for the purpose of finishing the WPA project referred to above? (4) Can our school board anticipate the proceeds of the sale of the demonstration farm by borrowing money for the purpose of constructing and repairing school buildings and purchasing equipment for the school, and repay the money so borrowed out of the proceeds of the sale of the demonstration farm?"

The act to which you refer is Act No. 559, H. 521, approved September 21, 1939 (General Acts, 1939, p. 881). Section 4 thereof reads in pertinent part as follows:

"Any moneys remaining after the payment of all amounts due to such local governmental units shall be paid into the treasury of the school board in administrative control of the school to which the farm was formerly attached, to be used by said board, together with any other funds to the credit of that farm, in constructing and repairing buildings, and for purchasing equipment for the school to which the farm was attached."

Inquiry made of the State Board of Education discloses that the school to which the State Secondary Agricultural School Demonstration Farm, located at or near Athens, Limestone County, was formerly attached is the Senior High School of Athens. Since the above quoted portion of Section 4, *supra*, provides very clearly that the funds accruing from the sale of real property, livestock, equipment and farm produce at each of the State Secondary Agricultural School Demonstration Farms, after the payment of the expenses of sale, etc., shall be used "in constructing and repairing buildings, and for purchasing equipment for the school to which the farm was attached," it is my opinion that none of these funds can be used for the purpose of repairing the buildings of the Elementary School of Athens, or for the purpose of adding a new room or two to the buildings of the Elementary School of Athens. In my opinion, such funds can only be used as the statute directs, i. e., "in constructing and repairing buildings, and for purchasing equipment for the school to which the farm was attached," which, in the instant case, is the Senior High School of Athens.

It is my opinion that these funds may be used for the purpose of finishing a WPA project for the erection of a football stadium at the Senior High School of Athens, which stadium, I am informed, will be used for the purpose of promoting the physical educational program of the school. Cf. Opinions to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of February 23, 1937, Quarterly Report of Attorney General, Vol. VI, page 85; to Hon. J. A. Keller, State Superintendent of Education, Montgomery, Alabama, under date of June 15, 1937, Quarterly Report of Attorney General, Vol. VII, page 218; and to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of September 27, 1937, Quarterly Report of Attorney General, Vol. VIII, page 320. See also *Alexander v. Phillips*, 31 Ariz. 503, 254 Pac. 1056; *Young v. Linwood School Dist.*, 193 Ark. 82, 97 S. W. (2d) 627; 52 A. L. R. 244, annotations.

I know of no provision of law which invests the City Board of Education of Athens with authority to anticipate funds accruing from the sale of real property, livestock, equipment and farm produce, less the expenses of sale etc., of the State Secondary Agricultural School Demonstration Farm located at or near Athens, Limestone County, by borrowing money for the purpose of constructing and repairing buildings at, and purchasing equipment for, the Senior High School of Athens, said money so borrowed to be repaid out of these funds. As I read Act. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610), which establishes a budget system and provides for the preparation of a budget for each county and city school system in the State and regulates school financing, it prohibits the City Board of Education of Athens from anticipating any school funds, except in the manner and for the purposes provided in Section 8 thereof, and anticipation of these funds for the purpose set out in your letter of inquiry does not come within the purview of that section.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 18, 1940.

Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

Attention Hon. J. Eugene Foster.

Workmen's Compensation Act—

Master and servant — schools and universities.—

Private school employing more than sixteen employees subject to Workmen's Compensation Act under Section 7543 of the Code of Alabama, 1923.

Essentials of relationship of employer and employee are voluntary rendition of service, its acceptance by employer, and employer's right to direct and control employees; payment of compensation being merely incidental thereto.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of March 15, 1940, in which you request my opinion as follows:

"It is respectfully requested that the Division of Labor, Workmen's Compensation Unit, be furnished with an opinion in view of the facts set forth in the attached file, as to whether or not Athens College, Athens Alabama, would be considered an employer subject to the provisions of the Alabama Workmen's Compensation Act under the conditions outlined in the attached correspondence.

"Inasmuch as the insurance carrier stands ready to issue a compensation policy of the College is deemed a subject employer, your prompt consideration will be greatly appreciated by all parties concerned.

"On March 5, 1940, Mr. Jesse M. Robbins, Assistant Manager, The Travelers Insurance Company, Atlanta, Georgia, wrote Mr. Walter H. Monroe, Supervisor Workmen's Compensation Unit, Department of Industrial Relations, the following letter:

" * * * Dr. E. R. Naylor, the President of the College states that this is an industrial program to be undertaken by Athens College. This school is now building a manufacturing plant which, when completed, will be used as a hosiery mill for the manufacture of stockings. The school, of course, is building the manufacturing plant and will own the property when completed. They will sell the manufactured products to the Cooper Wells Hosiery Company of Decatur, Alabama, who in turn will resell them to their jobbers or wholesalers.

"This industrial program contemplates taking 100 students who have finished high school in June of each year to be enrolled in Athens College. A contract will be made with them stating that each student will work four hours a day for eleven and a half months a year for the first three years, and three hours a day for eleven and half months the fourth year. For this labor Athens College will furnish actual college expenses, such as tuition, board and room, which amounts to approximately \$450. for each calendar year. The students, of course, who sign up, agree to stay four years in college.

"Another group of 100 will start in February of next year, and another group in June of 1941, which will make four units of 100 employees. These students contracted will receive no direct wages and, consequently, no money is received by the students from the college or paid by the students to the college, the only consideration being that of tuition, board and room.

"Both Dr. E. R. Naylor and the writer would like to have your opinion as to whether or not this activity or industrial program of Athens College would come under the Alabama Workmen's Compensation Law and, if so, under what particular section of such Law. Also, please tell us what basis of Compensation as to payroll could or would have to be used in determining a premium for Compensation if this Industrial Program does fall under the Alabama Workmen's Compensation Law."

I call your attention to Section 7543 of the Code of Alabama, 1923, which provides:

"Section 7543. Articles 1 and 2 of chapter not applicable to certain employments.—Articles 1 and 2 of this chapter shall not be construed or held to apply to any common carrier doing an interstate business, while engaged in interstate commerce, or to domestic servants, farm laborers or persons whose employment at the time of the injury is casual and not in the usual course of the trade, business, profession or occupation of the employer or to any employer who regularly employs less than sixteen employees in any one business or to any county, city, town, village or school district. Any employer who regularly employs less than sixteen employees in any one business or any county, city, town, village or school district may accept the provisions of articles 1 and 2 of this chapter by filing written notice thereof with the probate judge of each county in which said employer is located or does business, said notice to be recorded by the judge of probate for which he shall receive the usual fee for recording conveyances, and copies there to be posted at the places of business of said employers. Said employers who have so elected to accept the provisions of articles 1 and 2 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal. In no event nor under any circumstances shall articles 1 and 2 of this chapter apply to farmers and their employes." (Emphasis supplied)

Section 1 of Act 29, S. 49, approved March 17, 1936 (General Acts, Extra Session, 1936, p. 9), Michie's 2d 1936 Supplement to the Code of 1928, Section 7547, provides:

"PRESUMPTION AS TO ACCEPTANCE OF PROVISIONS OF ARTICLE 2. — All contracts of employment made on or after the first day of May, 1936, shall be presumed to have been made with reference to and subject to the provisions of Article 2 of this chapter unless otherwise expressly stated in the contract in writing, or unless written or printed notice has been given by either party to the other, prior to the accident, as hereinafter provided, that he does not accept the provisions of said Article 2. All contracts of employment made prior to, and existing on, the first day of May, 1936, shall be presumed to continue from and after the first day of May, 1936, subject to and under the provisions of Article 2 of this Chapter, unless on or prior to the first day of May, 1936, the parties have expressly agreed in writing to the contrary, or unless written or printed notice has been given by either party to the other, prior to the accident, as hereinafter provided, that he does not accept the provisions of said Article 2. Every employer and every employee shall be presumed to have accepted and come under Article 2 of this chapter and the provisions thereof relating to the payment and acceptance of compensation, unless, prior to the accident resulting in personal injury or death, he shall have given notice, as hereinafter provided, of his election not to accept or be bound by the provisions of said Article 2 of this chapter. 'EMPLOYER'S NOTICE. — The employer shall post and keep posted in a conspicuous place in his factory, shop or place of business, where the employee is employed, a written or printed notice of his election not to accept or be bound by the provisions of Article 2 of this Chapter, or he shall personally serve a copy of such notice on the employee; and he shall file a duplicate or copy of such notice with the Probate Judge of the county in which the employee is performing service under such employment.' 'EMPLOYEE'S NOTICE.— The employee shall give written or printed notice to the employer of his election not to accept or be bound by the provisions of said Article 2 of this Chapter and he shall file a duplicate or copy thereof, with an affidavit of service on the employer attached thereto, with the Probate Judge of a county in which he does business.' 'The said notices shall be recorded by the Probate Judge, for which he shall receive the usual fee for recording conveyances and a certified copy of any such recorded notice shall be presumptive evidence in any court in this State and that such employer or such employee, as the case may be, has elected not to accept or come under Article 2 of this chapter.'"

The purpose of compensation laws is to require industry to bear part of the burden of disability and death resulting from the hazards of industry. *Pow v. Southern Construction Co.*, 235 Ala. 580, 180 So. 288.

The essentials of relationship of employer and employee are voluntary rendition of service, its acceptance by the employer and employer's right to direct and control employees, **payment of compensation being merely incidental thereto.** *Reed v. Rideouts Ambulance Inc.*, 212 Ala. 428, 102 So. 906; *Stith Coal Co. v. Alvis*, 224 Ala. 603, 141 So. 663; *Mobile Liners Inc. v. McConnell*, 220 Ala. 562, 126 So. 626.

Generally speaking, a college or university may be held responsible in damages for tortious injuries to its students or others and it has been held that a university other than a State Institution is not a corporation administering governmental activities so as to absolve it from liability for injury to students. 14 C. J. S. 1348; *Hamburger v. Cornell University*, 172 N. Y. S. 5, 184 App. Div. 403, Motion Granted 112 N. Y. S. 895, 186 App. Div.

929, Affirmed 123 N. E. 868, 226 N. Y. 625, Reversing 166 N. Y. S. 46, 99 Misc. 564; **Lisa v. Yale University**, 122 Conn. 646, 191 Atl. 346; **Peden v. Furman University**, 155 S. C. 1, 151 S. E. 907.

Even though it is an eleemosynary institution, a private school chartered as a corporation with power to sue and be sued is liable upon its contracts in the same manner as an individual. 56 C. J. 172.

From the facts submitted it appears that Athens College is now building a manufacturing plant which when completed will be used as a hosiery mill for the manufacture of stockings. The college intends to sell the manufactured products to Cooper Wells Hosiery Company of Decatur. In my opinion, this is clearly a private enterprise on the part of the college.

The students are to enter into a contract with the college to work eleven and a half months, four hours a day in the hosiery mill for board, room and tuition which the college estimates to be worth \$450. The students are to work for three years at the above rate and the fourth year they are to work eleven and a half months at three hours a day for their board, room and tuition. The college intends to employ 100 students to begin with, succeeding numbers will be added in groups of 100 until four units are working. The students all sign a contract to stay four years in the college.

I am of the opinion that this activity on the part of the college would subject it to the operation of the Workmen's Compensation Act of Alabama. Furthermore, it is significant that the definition of the term "employer" plus the specific exceptions from the operation of the Compensation Act in Section 7543 of the Code, *supra*, is so comprehensive as to include within its scope an institution such as the employer herein; and there is nothing about the act as a whole which discloses a legislative purpose to have limited its application solely to businesses and industries within the ordinary sense of the word. The legislature in framing the Act has had many opportunities to have exempted private schools from its operation if it had chosen to have done so and the fact that no such exception was created warrants the fair assumption that it was the legislative intent to have brought such institutions within the Act. See **Hope v. Barnes Hospital**, 55 S. W. (2d) 319, 227 Mo. App. 1055; **Hall v. Salvation Army**, 261 N. Y. 110, 184 N. E. 691.

The premises considered, it is my opinion that unless the college elects not to come within the operation of the Workmen's Compensation Act by a strict compliance with Section 7543, *supra*, and Section 7547, *supra*, it will be presumed to have accepted the provisions of Article 2 of the Workmen's Compensation Act and be governed accordingly.

I would suggest that you take the matter up with the State Department of Industrial Relations, Workmen's Compensation Division, concerning what basis of compensation you should use in determining the amount of the premium for compensation, as they are charged with the duty of properly administering the Workmen's Compensation Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 18, 1940.

Dr. L. N. Duncan, President,
Alabama Polytechnic Institute,
Auburn, Alabama.

Traveling expenses — Alabama Polytechnic Institute—

Expense accounts of officers and employees of the Alabama Polytechnic Institute, or of any of its divisions, not required to be itemized, verified by affidavit, with vouchers or receipts therefor attached, in the manner provided by Section 820 of the Code of Alabama, 1923, before the same may be legally paid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 5, 1940, in which you request my opinion as follows:

"As you know, we have three main divisions of the Alabama Polytechnic Institute, i. e., Resident Teaching, Agricultural Research, and Agricultural Extension, all of which are under the general supervision and control of the Board of Trustees of the Alabama Polytechnic Institute. Shortly after the passage of Act No. 87, H. 6, approved March 23, 1933 (General Acts, 1933, p. 81), commonly referred to as the McGowin Act, which limited the amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expenses of transportation to \$3.00 per diem, the Board of Trustees of the Alabama Polytechnic Institute adopted a resolution at its meeting in the office of the Governor in Montgomery, Alabama, on July 17, 1934, which reads as follows:

"Item 4. RESOLVED: That in view of Alabama Act No. 87, approved March 23, 1933, all officials and representatives of each and every department and division of The Alabama Polytechnic Institute shall be allowed reimbursement for travel subsistence at the rate of \$3.00 per diem, while away from headquarters on official business for the Institution, this policy of the Board being effective with the approval of this Act on March 23, 1933, and thereafter."

"Since that time all officials and employees of each of the divisions of the Alabama Polytechnic Institute have been reimbursed for traveling expenses in accordance with the provisions of the resolution of the Board of Trustees above quoted, i. e., they have been reimbursed at the rate of \$3.00 per diem. Each day is divided into four quarters of six hours each, and the officials and employees of the Alabama Polytechnic Institute are only reimbursed at the rate of \$3.00 per diem for the number of quarters in a day during which they travel in the service of the Institution. In other words, if one of them is traveling only six hours in one day, he is reimbursed seventy-five cents for that time. If he is away twelve hours, he is reimbursed \$1.50 and so on. However, we have not required officials and employees traveling in the service of the In-

stitution to file itemized statements of such traveling expenses, with vouchers or receipts for each expenditure attached. A sample of the standard form of the expense account, which has been in use at the Alabama Polytechnic Institute and which has been approved by the appropriate Federal authorities is herewith enclosed for your information.

"The question has recently been raised as to whether or not, in view of the provisions of Section 820 of the Code of Alabama, 1923, we should require the officials and employees traveling in the service of the Institution to itemize their expense account and attach vouchers or receipts for each expenditure, before we reimburse them for their traveling expenses.

"As you know, the warrants or checks in payment of such traveling expenses are drawn by the Treasurer of the Alabama Polytechnic Institute and are not drawn by the State Auditor or State Comptroller on the State Treasury, and are not paid by the State Treasurer. Your attention is also called to the fact that all State appropriations to the different divisions of the Alabama Polytechnic Institute are paid to the Institution in lump sums from time to time, in the following manner: The President of the Alabama Polytechnic Institute makes his requisition therefor to the Director of Finance or State Comptroller, and the State Comptroller draws his warrant therefor upon the State Treasury, and the State Treasurer pays the same to the President of the Alabama Polytechnic Institute.

"The premises considered, I request your official opinion on the following question: Does Section 820 of the Code of Alabama, 1923, or any other provision of the statutory law of the State of Alabama, require the expense accounts of officers and employees of the Alabama Polytechnic Institute, or of any of its divisions, to be itemized, with vouchers or receipts for each expenditure attached, before the same may be paid legally?"

In my opinion, your inquiry should be answered in the negative.

If there is any provision of our statutory law which requires expense accounts of officers and employees of the Alabama Polytechnic Institute, or of its divisions, to be itemized, verified by affidavit, with vouchers or receipts therefor attached, it is Section 820 of the Code of Alabama, 1923, which reads as follows:

"Section 820. Itemized statement of expenses filed with auditor before warrant issued. — All officers and employees who travel at the expense of the state, shall, before warrants issue for such expenses, file with the state auditor an itemized statement of such expenses, verified by affidavit, with vouchers therefor attached, when any item amounts to fifty cents or more, and it shall be unlawful for the auditor to draw his warrant on the state treasurer for such traveling expenses until such itemized statement, verified by affidavit, with vouchers attached, is filed with him. Where the law provides a specific allowance for traveling expenses, only so much thereof shall be paid by the state as is actually expended, and such persons shall file their statements of such expenses as herein provided."

While it may be true that the officers and employees of the Alabama Polytechnic Institute, and of each of its divisions, are traveling at the expense of the State, since State funds are appropriated toward the support and maintenance of the Alabama Polytechnic Institute, and of each of its divisions, yet, as stated by you, all State appropriations to the Alabama Polytechnic Institute, and to each of its divisions, are paid to the President of the Alabama Polytechnic Institute upon his requisition therefor to the Director or State Comptroller, by warrant of the State Comptroller upon the State Treasury, and warrants or checks in payment of the expense accounts of the officers and employees of the Alabama Polytechnic Institute, and of each of its divisions, are drawn by the Treasurer of the Alabama Polytechnic Institute upon the funds of the Institute, and are not drawn by the State Auditor or State Comptroller on the State Treasury, and are not paid by the State Treasurer. This being true, a reading of the provisions of Section 820, supra, shows that it is not applicable to the expense accounts of such officers and employees. This for the reason that Section 820 applies only to the expense accounts of officers and employees whose traveling expenses are paid by warrant of the State Auditor (State Comptroller) on the State Treasurer. Cf. that part of the opinion of this office to Hon. H. F. Lee, State Auditor Capitol, under date of February 26, 1919, Biennial Report of Attorney General, 1918-1920, page 104, holding that the provisions of Act No. 151, H. 227, approved February 17, 1919 (General Acts, 1919, page 145), from which the provisions of Section 820, supra, were taken, were inapplicable to traveling expenses of the Commissioner of Agriculture and his employees which, under Section 52 of the Political Code then in effect, were not paid upon warrants drawn by the State Auditor on the State Treasurer.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 18, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Licenses — Motor vehicles—

License year, due date, delinquency, grace period, monthly declining basis, and half-year license, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 9, 1940, in which you request my opinion as follows:

"There are two questions that are still not clear in my mind and your opinion on these will be appreciated.

"1. Where a motor vehicle is purchased in December and not operated until June, can we sell tag for the remaining months on the monthly declining basis or should we sell one-half year license?

"2. Where a motor vehicle is purchased in June can we sell tag for the remaining months on the monthly declining basis or should we sell one-half year license?

"Your ruling to me under date of February 19, Schedule 158.13 states 'Where motor vehicle is **acquired** or brought into the state on or after May 15, one-half of the license herein provided for shall be paid plus One Dollar.' Does this mean that we can only sell one-half year license plus \$1.00 for any motor vehicle after May 15, regardless of when purchased?"

Apparently, there is considerable confusion in regard to the subject of motor vehicle licenses in the minds of the various probate judges and other officials throughout the State, much of which has been caused, no doubt, by various changes made in the statutes in regard thereto since the time the 1935 Revenue Act became effective. Therefore, I deem it advisable to here restate the holdings of the various opinions of this office on this subject.

1. After the beginning of the license year, a person becomes liable for motor vehicle license immediately upon operating the motor vehicle upon the public highways of the State, and would then be subject to the penalties for delinquency provided by statute except for the grace periods for the purchase of such license allowed by statute or by rule or regulation made by the State Department of Revenue, pursuant to statutory authority vested in said department. Opinions to Hon. Henry S. Long, President, State Tax Commission, Capitol, under date of October 30, 1935, Quarterly Report of Attorney General, Vol. I, page 140; and to Hon. B. P. Singleton, Chief Examiner of Public Accounts, Capitol, under date of January 8, 1940, a copy of which is herewith enclosed for your information.

2. The license year on motor vehicles begins on November 15 of each year and ends on November 14 following. Opinion to Hon. L. W. Price, Judge of Probate, Conecuh County, Evergreen, Alabama, under date of November 8, 1939, Quarterly Report of Attorney General, Vol. XVII, page 189.

3. A motor vehicle may be operated on the public highways of the State under a license for the then current license year through November 14, but not after that date, without any obligation being incurred thereby for the purchase of a new license for the succeeding license year. Opinion to Judge Price, *supra*.

4. Motor vehicle licenses become due on November 15 of each year and delinquent on November 16 of each year. Opinion to Judge Price, *supra*.

5. The purchaser of any motor vehicle has ninety-six hours, or four days, immediately following the purchase within which to secure a license

without being subject to any penalties for delinquency, provided certain requirements are met, pursuant to a rule or regulation promulgated by the State Department of Revenue (formerly the State Tax Commission) under the authority vested in it by Section 2 of Act No. 67, H. 21, approved February 9, 1937 (General Acts, 1936-37, page 86) and Act No. 163, H. 46, approved March 2, 1937 (General Acts, 1936-37, page 186). Opinion to Mr. Singleton, *supra*.

6. Motor vehicle license for new and used automobiles and trucks only, purchased or acquired on or after November 15, but not before, may be purchased on a monthly declining basis as provided by Act No. 67, *supra*, and Act No. 93, H. 42, approved February 12, 1937 (General Acts, 1936-37, page 108). Opinions to Hon. Eugene B. Henry Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of April 21, 1937, Quarterly Report of Attorney General, Vol. VII, page 45; to Hon. F. B. Thompson, Judge of Probate, Clay County, Ashland, Alabama, under date of February 7, 1938, Quarterly Report of Attorney General, Vol. X, page 77; to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of February 19, 1938, Quarterly Report of Attorney General, Vol. X, page 98; to Hon. J. A. Carnley, Judge of Probate, Coffee County, Enterprise, Alabama, under date of March 11, 1938, Quarterly Report of Attorney General, Vol. X, page 139; to Hon. J. S. Benson, Judge of Probate, Jackson County, Scottsboro, Alabama, under date of March 29, 1939, Quarterly Report of Attorney General, Vol. XIV, page 269.

7. Months, under the statutes providing for the purchase of certain motor vehicle licenses on a monthly declining basis, begin on the fifteenth day of each month, rather than on the first day of each month. Opinion to Judge Price, *supra*.

8. Motor vehicle license for ambulances, hearses, taxicabs, trailers and all motor vehicles other than new and used automobiles and trucks, may not be purchased on a monthly declining basis, regardless of the date on which the motor vehicles is purchased. Opinions to Judge Hill, *supra*; to Judge Carnley, *supra*; to Judge Benson, *supra*; to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of October 5, 1939, Quarterly Report of Attorney General, Vol. XVII, page 35.

9. Motor vehicle license for any motor vehicle purchased or acquired prior to November 15 may not be purchased on a monthly declining basis, even though the motor vehicle is not brought into the State of Alabama or operated on the public highways thereof prior to the date on which application is made for license. Opinions to Judge Benson, *supra*, and opinions therein cited and followed; to Hon. C. B. Gullatt, Jr., Judge of Probate, Russell County, Seale, Alabama, under date of August 14, 1939, Quarterly Report of Attorney General, Vol. XVI, page 148; and to Hon. G. W. Robertson, Judge of Probate, Baldwin County, Bay Minette, Alabama, under date of January 16, 1940, a copy of which is herewith enclosed for your information.

10. Half-year license for motor vehicles, provided for by Schedule 158.13 of Section 348 of Chapter 6 of Article XIII of the 1935 Revenue Act, may not be sold until May 15. Opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of February 19, 1940, a copy of which opinion has heretofore gone forward to you.

11. Provisions for half-year license are applicable to all motor vehicles, other than new and used automobiles and trucks, acquired or brought into the State of Alabama on or after May 15 or not used or operated on the public highways of the State of Alabama, between the period from November 15 through May 14, and also to new and used automobiles and trucks purchased prior to November 15 but not operated on the public highways of the State of Alabama during the period from November 15 through May 14. Opinion to Judge Benson, *Supra*, as modified by the opinion to Judge Howard, *supra*.

12. A person purchasing a new motor vehicle during the month of October is required to purchase a motor vehicle license for the then remaining portion of the license year, which expires on November 14, and must also purchase a license for the succeeding license year which begins on November 15, if he desires to operate same on the public highways of the State on or after that date. Opinion to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Alabama, under date of April 9, 1940, a copy of which is herewith enclosed for your information.

Applying the above stated holdings to your specific inquiries, I answer the same as follows:

1. If the motor vehicle which is purchased in December and not operated until June is a new or used automobile or truck, you may sell a license for the same for the then remaining months of the license year on a monthly declining basis.

2. If the motor vehicle which is purchased in June is a new or used automobile or truck, you may sell a license for the same for the then remaining months of the license year on a monthly declining basis.

From the answers above given to your specific inquiries, you can see that nothing in the opinion to you under date of February 19, *supra*, affects the selling of motor vehicle licenses for new and used automobiles and trucks purchased or acquired on or after November 15 on a monthly declining basis in any way whatsoever.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 18, 1940.

Hon. C. H. Keller,
Register in Chancery,
Cullman County,
Cullman County.

1. Executions — Sheriff not required to hold civil execution issued out of circuit court for thirty days before making his return.

2. Costs — In chancery or equity case, when judgment or decree is for the defendant, the costs are taxed against the complainant or plaintiff, execution therefor is issued against the complainant or plaintiff and returned "no property found," execution may not then issue against the defendant for the costs or any part of them.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of February 29, 1940, in which you request my opinion as follows:

"I will thank you to give me an opinion on the following questions:

"1. Is there any statute requiring the Sheriff to hold a civil execution out of Circuit Court for thirty days before making his return?

"2. Is there any statute which would authorize the issuance of an execution in a chancery case against the defendant when the complainant loses his case and the cost is taxed against the complainant?

"My contention is that both questions should be answered in the negative. Am I correct in so assuming?"

In answer to your first inquiry, you are advised that I know of no statute which requires the sheriff to hold a civil execution out of circuit court for thirty days before making his return. Section 7795 of the Code of Alabama, 1923, as amended by Act No. 157, H. 256, approved April 21, 1936 (General Acts, 1936, p. 181) governs the issuance of executions. See opinion to Hon. Howard Kirby, Clerk, Circuit Court, Etowah County, Gadsden, Alabama, under date of July 15, 1935, Biennial Report of Attorney General, 1934-36, page 230. Said section, as amended, reads as follows:

"Section 7795. ISSUE OF EXECUTIONS MUST BE SIGNED AND TESTED. — After the lapse of ten days, and within ninety days, from the rendition of a judgment or decree, the clerk or register must issue execution thereon in favor of the successful party, unless otherwise directed by the court or the judge presiding at the trial of the cause. The writ must be signed by the clerk or register, and tested on the day it is issued."

Section 7813 of the Code of Alabama, 1923, governs the execution of the writ and the return thereof by the sheriff and provides as follows:

"Section 7813. To be executed with diligence and returned. — He must execute the writ with diligence, and if practicable, perform the mandate thereof, and make return of his acts to the clerk or register as soon as practicable and not later than ninety days from the date of the execution."

The only statutory provision of which I am aware which provides that an execution may not be returned by the sheriff within less than thirty

days from the time it goes into his hands is Section 3735 of the Code of Alabama, 1923, which reads as follows:

"Section 3735. When prisoner deemed insolvent; return of execution. — No prisoner shall be regarded as insolvent without the return of 'no property' upon execution issued against him, in the particular case; and no execution shall be so returned within less than thirty days from the time it goes into the hands of the sheriff."

It is obvious that this section has no application to civil executions.

In reply to your second inquiry, I know of no statute which would authorize the issuance of an execution in a chancery case against the defendant when the complainant or plaintiff loses his case and the costs are taxed against him. Sections 7263 and 7805 of the Code of Alabama, 1923, provide for the issuance of an execution against the plaintiff in civil or equity cases, as the case may be, for the costs created by him when the judgment or decree is against the defendant, the costs are taxed against the defendant, and execution therefor is issued against him and returned "no property found." In opinions to Hon. Theo Hurt, Clerk, Circuit Court, Perry County, Marion, Alabama, under date of May 8, 1936, Quarterly Report of Attorney General, Vol. III, page 91, and under date of July 24, 1936, Quarterly Report of Attorney General, Vol. IV, page 85, it was held that these sections did not authorize the issuance of an execution against the defendant in a civil case for the costs or any part of them where the judgment was in his favor and the costs were taxed against the plaintiff, even though execution therefor had been issued against the plaintiff and returned "no property found." The same is equally true in a chancery or equity case, where the judgment or decree is in favor of the defendant, the costs are taxed against the complainant or plaintiff, and execution therefor is issued against him and returned "no property found." In such an event, execution may not issue against the defendant for the costs or any part of them. You are respectfully referred to the opinions, rendered to Mr. Hurt, *supra*, for the reasons in support of the conclusion therein reached.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 18, 1940.

Hon. Wilbur L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

Alabama Alcoholic Beverage Control Board has authority to promulgate rule or regulation prohibiting erection of signs or billboards advertising malt or brewed beverages outside any place of business at which such beverages are sold, if such signs or billboards have the

effect of calling attention to the fact that such beverages are sold at such place of business.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 20, 1940, in which you request my opinion as follows:

"On July 8, 1938, the Attorney General's office rendered an opinion which held that the Alabama Alcoholic Beverage Control Board did not have the authority to promulgate regulations prohibiting the erection of signs or billboards advertising malt or brewed beverages within two hundred feet of any place of business where such beverages were sold. In the last paragraph of this opinion, the reasons given for such a decision were as follows:

"It is evident that the purpose of Section 28, supra, was to prevent calling attention to the fact that alcoholic beverages were on sale at said places. You do not state in your request for an opinion that the signs or billboards within two hundred feet of the place duly licensed to sell alcoholic beverages call attention to the fact that the beverages advertised are for sale at such places of business. Consequently, I express no opinion upon the question of whether or not the Board would have the authority to promulgate a rule or regulation prohibiting the erection of a sign or billboard within two hundred feet of a place duly licensed to sell alcoholic beverages if the sign or billboard called attention to the fact that the alcoholic beverages which it advertised were sold within said place of business.'

"Since the date the above opinion was rendered, the breweries selling their products in this State have almost covered the highways with small road-signs or billboards and in almost every instances, these signs are placed on both sides of a place licensed by this Board to sell malt or brewed beverages, such billboards being located adjacent to the licensed premises, and, in some instances touching the line of these premises.

"One of the breweries has erected a sign with the name of the beer printed on such sign with an arrow in the form of a windmill which gives the name of the beer and has a sign 'Sold Everywhere' and then the wind mill blows, it naturally points to the establishment located within a radius of a few feet which has been issued a malt or brewed beverage license.

"Section 7, Article a, of the Alabama Beverage Control Act, authorizes the Board to make such Rules and Regulations not inconsistent with the Act, as it shall deem necessary for carrying out the provisions of the Act. The last paragraph of Section 36 gives the penalty for violating a Rule and Regulation when duly made and promulgated by the Board and sets a fine of \$50.00 to \$100.00 for each conviction for such violation.

"Section 28 of the Act not only provides relative to the erection or display of signs outside any place of business but states further that it is the intent and purpose of this Act to prevent the so-called open saloons being operated within this State. From a portion of Section 10, we quote the following:

"In order to protect the welfare, health, peace, temperance and safety of the people of this State and to prevent the saloon atmosphere, there shall be no alcoholic beverages as defined herein sold in less than sealed packages."

"From the above quotation, the use of signs and billboards adjacent to a place licensed to sell malt or brewed beverages would definitely give that place a saloon atmosphere.

"The Legislature, when this Act was passed, must have had in mind the rigid enforcement of Section 28, inasmuch as they specifically authorized the Board to make Rules and Regulations governing the advertising of malt or brewed beverages outside any place licensed to sell such beverages and when such a regulation had been duly made and promulgated in conformity with this Section, the violator, upon conviction, would be guilty of a misdemeanor and would be fined not more than \$500.00 for each offense and, in addition thereto, could be imprisoned in the County Jail not to exceed six months. The authority given the Board under Section 28 is in addition to the authority mentioned in Section 7, Article a, of said Act and deals entirely with the provisions of Section 28.

"It will be appreciated very much if you will reconsider all the facts involved and furnish us an opinion as soon as possible advising whether or not the Board has the authority to promulgate Rules and Regulations governing the erection of billboards or signs adjacent to or within reasonable distance of a place duly licensed to sell beverages advertised by such billboards."

The opinion to which you refer in your letter of inquiry was rendered to Hon. D. E. Dunn, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of July 8, 1938, Quarterly Report of Attorney General, Vol. XII, page 42, and held as follows:

"The Beverage Control Board held without authority to promulgate regulation prohibiting erection of signs or billboards advertising malt or brewed beverages within 200 feet of any place of business at which such beverages are sold."

The pertinent provisions of the Alabama Beverage Control Act were set out in that opinion as follows:

"The pertinent provisions of the Alabama Beverage Control Act dealing with advertising are Sections 10 and 28. Section 10 provides in part as follows:

"There shall be no advertising of alcoholic beverages as enumerated and defined herein, except through newspapers, magazines,

and radio broadcasting stations, provided, however, that malt or vinous beverages as herein defined may be advertised by means of billboards.'

"Section 28 provides in part as follows:

"There shall be no electrical signs, painted signs, etc., displayed outside any place of business advertising alcoholic beverages as enumerated and defined. * * *

"The Alabama Alcoholic Beverage Control Board shall have authority to promulgate rules and regulations for the carrying out of this section.'"

From the excerpt from the opinion set out in your letter of inquiry, it is to be noted:

1. That it is evident that the purpose of the quoted excerpts from Section 28, supra, was to prevent calling attention to the fact that alcoholic beverages were on sale at certain places.

2. That since Mr. Dunn did not state in his request for an opinion that the signs or billboards within 200 feet of a place duly licensed to sell alcoholic beverages called attention to the fact that the beverages advertised were for sale at said place of business, no opinion was expressed upon the question of whether or not the Board would have the authority to promulgate a rule or regulation prohibiting the erection of signs or billboards within 200 feet of a place duly licensed to sell alcoholic beverages if the signs or billboards called attention to the fact that the alcoholic beverages which it advertised were sold within said place of business.

As I understand your request, you desire my opinion as to whether or not the Alabama Alcoholic Beverage Control Board has the authority to promulgate a rule or regulation prohibiting the erection of signs or billboards advertising malt or brewed beverages outside any place of business at which such beverages are sold, which signs or billboards have the effect of calling attention to the fact that such beverages are sold at such place of business. In my opinion, the Board is invested with such authority under the quoted excerpt from Section 28, supra. As stated in the opinion to Mr. Dunn, it is evident that the purpose of the quoted excerpt from Section 28, supra, was to prevent calling attention to the fact that alcoholic beverages were on sale at such places, and said quoted excerpt invests the Board with authority to promulgate rules and regulations "for the carrying out of this section." Certainly, a rule or regulation prohibiting the erection of signs or billboards advertising malt or brewed beverages outside of any place of business at which such beverages are sold, which signs or billboards have the effect of calling attention to the fact that the beverages advertised are for sale at such place of business, is a reasonable rule or regulation for carrying out the evident purpose of the quoted excerpt from Section 28, supra.

Of course, the question of whether or not particular signs or billboards advertising malt or brewed beverages outside a particular place of business at which such beverages are sold have the effect of calling attention to the fact that the beverages advertised are for sale at such place of business is a question of fact which addresses itself to the Board, and upon which I can express no opinion.

This opinion is not in conflict with the opinion rendered to Mr. Dunn, *supra*, and is not to be considered as overruling the same. It merely gives my views on a question on which no opinion was expressed in the Dunn opinion, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 18, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Schools — County Boards of Education have no authority to purchase educational books and magazines for teachers and pay for same out of school general fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 11, 1940, in which you request my opinion as follows:

"Please refer to your ruling on Page 769, Biennial Report for 1928-1930, and give me your answer to the following question:

"Can a County Board of Education legally purchase educational books and magazines for the teachers of the County, to be paid for from the School General Fund?

"This request is not to be considered in the light of any Local Acts or General Acts with local application."

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to the County Superintendent of Education of Dale County on February 14, 1930 (Biennial Report of Attorney General, 1928-30, page 769), it was held that a county board of education had no authority to pay for subscriptions to educational publications from school funds. This holding was followed in an opinion rendered to Hon. Raymond E. Thomason, Member, Jefferson County Board of Education, on December 17, 1934 (Opinions of Attorney General, Volume 1-A, Office Ed., page 108).

There is no authority of law authorizing the expenditure under consideration, which may be of educational value but is, nevertheless, principally for the private benefit of the individual teacher.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 18, 1940.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Poll Tax—National Guard—

Person who becomes active member of National Guard between October 1 and February 1 is exempt from payment of poll tax for the ensuing tax year, in view of Section 4 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774).

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for an official opinion, bearing date of March 23, 1940, which is as follows:

"Under the provisions of an Act of the Legislature of 1927, page 566 Section 45, members of the National Guard are made exempt from the payment of poll tax during active membership, and the custom in this County has been for the Commanding Officer of the Military Unit to certify to the Probate Judge the membership of his organization on October 1st of each year, and such as have been certified are exempted from the payment of poll tax.

"I now have an application for exemption from the payment of poll tax by a member of the National Guard who was not a member on October 1st, but who became a member in good faith in November, 1939, and is still an active member.

"I shall appreciate it if you will advise me whether becoming a member of the National Guard after October 1st, the due date of the tax, and before February 1st, the delinquent date, would entitle the National guardsman to a poll tax exemption.

"I shall appreciate a prompt reply to this request in order that I may finish compiling the poll list."

It is my opinion that who becomes an active member of the National Guard between October 1 and February 1 is exempt from payment of poll tax for the ensuing poll tax year.

Section 45 of Oct No. 494, S. 320, approved September 9, 1927 (General Acts, 1927, page 566), to which you refer in your request, was superseded by Section 11 of the Military Code of 1936, Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, page 105), which in turn was amended by Section 4 of Act No. 509, H. 723, approved September 22, 1939 (General Acts, page 774). This section as amended by the 1939 Act is as follows:

"Section 11. **EXEMPTION FROM POLL TAX, STREET TAX AND JURY DUTY:** Owing to liability to call for military duty during their term of service, every officer and enlisted man of the National Guard and Naval Militia of Alabama shall be exempt from poll tax, road duty, street tax and jury duty during his active membership, any local or special laws to the contrary notwithstanding; provided that every person who shall have served an aggregate of twenty-one years in the active National Guard or Naval Militia of Alabama shall be thereafter forever exempt from poll tax, road duty, street tax and jury duty by reason of such service, any other laws to the contrary notwithstanding. The commanding officer of any company, troop, battery, or any similar organization, shall furnish each member of his command applying for same such certificate of membership as may be prescribed by the Adjutant General, signed by such commanding officer, which certificate shall be accepted by any court as proof of exemption as provided by this law. Such certificates shall be issued to every officer and enlisted man, as aforesaid, under such Regulations and upon such forms as may be prescribed and provided by the Adjutant General. **The said certificates shall be effective, as to poll tax, for the poll tax year for which same is issued without regard to dates prescribed for payment of poll tax,** and as to the other exemptions provided herein, the same shall be effective for the calendar year in which it is issued. The Commanding Officer of a Division, Brigade, Regiment or separate Battalion shall issue similar certificates to each of his field officers, commissioned and enlisted staff, and the Adjutant General with the approval of the Governor shall issue similar certificates to each General Officer of the Alabama National Guard, and to each Regimental Commander not in the Brigade or Division of a General Officer of the Line of the Alabama National Guard, and to each commissioned officer, warrant officer and enlisted man of the National Guard whose immediate tactical commanding officer is not a member of the Alabama National Guard." (Emphasis supplied)

It is my opinion that the underlined portion of the above section exempts a person who became an active member of the National Guard between October 1 and February 1. The obvious intention of this section was to get around the Supreme Court decision in the case of *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57, that any status exempting one from the payment of poll tax must exist on October 1, the date the poll tax becomes due. It is my opinion that the intent of this Act is to exempt guardsmen for the balance of the poll tax year (October 1 through September 30), even though they join the National Guard after the due date of the tax, October 1. See opinion of the Attorney General to Hon. T. C. Almon, Judge of Probate, Morgan County, Decatur, Alabama, under date of December 3, 1939, Quarterly Report of Attorney General, Vol. XVII, page 338. This opinion does not pass upon the constitutionality vel non of the 1939 Act, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 18, 1940.

Hon. Thomas F. McDowell, Judge,
Inferior Court of Ensley,
Jefferson County,
Ensley, Alabama.

Inferior Court of Ensley—

1. Length of time suit may be carried on docket for purpose of issuing alias and plures summons and complainant is within discretion of trial court.

2. Inferior Court of Ensley has no statutory term but is always open for business.

3. In determining the "amount in controversy" resort should be had to amount claimed, not to amount for which judgment was entered.

(Act No. 193, H. 515, approved November 3, 1932, Local Acts, 1932, page 76)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 25, 1940, in which you request my opinion as follows:

"The Inferior Court of Ensley was created by Local Acts, Extra Session, 1932, at page 76, and under which I shall greatly appreciate an expression of opinion from you to the following questions:

"1. In the event a suit is filed and docketed and no service of the summons and complaint is had on the defendant, but the same is returned by the officer charged with service 'not found,' how long may the suit be carried on the docket for the purpose of issuing an alias summons and complaint?

"2. In the event the officer charged with the service of a summons and complaint fails to make a return at all, how long may the suit remain on the docket as pending?

"3. Please advise also, under the acts creating this Court, what is the Court's term, and should each case be continued by the Court from term to term to be active.

"4. Under date of July 25, 1938, your office through Hon. William H. Loeb, advised the then clerk of this Court that constables serving this court were entitled to the same fees in civil matters as the Sheriff when the amount in controversy exceeds \$20.00; in the event the original

suit claims more than \$20.00, but that judgment is rendered for less than \$20.00, should the constable be awarded sheriff fees?

"Please give this your early attention as several of the questions asked will serve the State Examiners now auditing this Court in properly reporting on this Court's affairs."

Replying to your first inquiry, please be advised that I have found no restriction on the duration of time which must exist for the purpose of issuing alias or plures summons and complaints where the summons is returned, by the officer charged with service, "not found." It would appear that this is a matter entirely within your discretion as judge of the Inferior Court of Ensley, for the judge of the court must always be vested with some discretion as to the control and regulation of its calendar or docket. **64 C. J. 46, Section 26.** In every instance, of course, due regard should be had by the court for the number of cases pending on his docket, i. e., the congestion thereof, and the diligence with which the parties have proceeded. On the other hand, the case should not be stricken from the docket until the plaintiff has been afforded a reasonable opportunity to have service of process. Certainly, courts have inherent power to strike from the docket a cause improperly there (**64 C. J. 57, Section 49;**) and accordingly if, after considering all of the circumstances, it appears to you that the best interests of all concerned will be served by such an order, I find no restriction in the statutes upon your right to do so. If, on the other hand, you find it desirable to award a further process to bring the parties defendant before you, you have the inherent power—without regard to powers specifically given by statute—to do so. **U. S. Blowpipe Co. v. Spencer, 33 S. E. 342 (W. Va.).**

With respect to your second inquiry, I call your attention to Section 5876 of the Code of Alabama, 1923, which provides in pertinent part that:

"Every court has power * * * 2. To compel obedience to its * * * process."

If the officer charged with the service of the summons and complaint fails to make a return, the court should properly issue an order directing said officer to make the return as required and if the return is made showing the defendant to be "not found," you should proceed as detailed in my answer to your first question.

Answering your third inquiry, a careful examination of Act No. 193, H. 515, approved November 3, 1932 (Local Acts, 1932, page 76), creating the Inferior Court of Ensley, fails to reveal that any "term of court" is fixed by law. It would appear, therefore, that the court is always open for the transaction of business. See **Section 21 of Act No. 193, supra; 15 C. J. 876, Section 220.** This conclusion obviates the necessity of an answer to the second part of your third inquiry.

Replying to your fourth inquiry, you are advised that the true test of jurisdiction, as to the amount in controversy, is the amount actually claimed—not the amount for which judgment is entered. Cf. **Crabtree v. Cliatt, 22 Ala. 181, 188; Taylor v. Woods, 52 Ala. 474, 476.** Therefore, if the claim in an original suit is for more than \$20, the constable should be awarded the sheriff's

fees, even though judgment is rendered for less than \$20. See **Quarterly Report of Attorney General, Vol. XI, page 94.**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 19, 1940.

Hon. Joe W. Baker,
Chairman, Board of Education,
Cherokee County,
Centre, Alabama.

Schools—County Board of Education has no authority to refund advances made by private citizens in 1935-1936 for purpose of aiding in erection of school building if claim was not properly filed by December 1, 1939, in accordance with Section 11 of Act No. 454, H. 642, approved September 21, 1939 (General Acts, 1939, page 610, Pamphlet).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of recent date in which you request my opinion as follows:

"Request is hereby made for your official opinion on the question herein presented:

"In 1935-1936, the County Board of Education of Cherokee County found it necessary that a new building be erected to provide for the needs of the Spring Garden High School of this county.

"In raising funds for this purpose, certain citizens of the Spring Garden High School District borrowed some money on their note and advanced such money to the County Board for the purpose of making up a sufficient sum to erect this building, which was erected in 1936, and such money so borrowed by said citizens and advanced to the County Board was used in the erection of the building which is now being occupied and used by the Spring Garden High School.

"The Cherokee County Board of Education now desires to pay what is now owed on this note for said money borrowed by said citizens as aforesaid.

"Please advise us promptly as you can, if the County Board of Education can lawfully reimburse these citizens for said amount now owed on this note."

I am of the opinion that your inquiry should be answered in the negative. Section 11 of Act No. 454, H. 642, approved September 21, 1939 (General

Acts, 1939, p. 610, Pamphlet), provides as follows:

"Section 11. UNFUNDED DEBTS.—If any county or city board of education has outstanding on October 1, 1939, any unfunded or floating debts, an itemized statement of the same shall be filed by said board with the State Superintendent of Education not later than December 1, 1939. Upon the approval of the State Superintendent of Education said board shall have the authority to pay said floating debts from any balances on hand at the close of any fiscal year provided that this authority shall expire on October 1, 1945."

Under your statement of facts, it does not appear that the provisions of the above quoted section have been met. Therefore, the claim in question cannot now be paid.

The above is true, regardless of whether or not the transaction in question was valid in the first instance. I do not deem it necessary to pass upon the question as to whether or not Section 137 of the School Code, which provides for refunding advances made by private individuals to county boards of education for aiding in the building, furnishing or equipping of a public school building has been superseded or repealed by the School Budget Act of 1935, viz: Act No. 300, S. 551, approved September 2, 1935 (General Acts, 1935, page 728), or the 1939 act, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

County Superintendent of Education, appointed by the County Board of Education under the General Laws of the State, does not have to file at the end of each month an itemized and verified statement of his traveling expenses, where he is allowed in his contract of employment with the County Board of Education as a part of his compensation "an expense allowance of \$800 per annum, to be paid in regular monthly installments of \$66.66 2/3."

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of April 1, 1940, in which you request my opinion as follows:

"I am asking your opinion on three points concerning the expense account of the county superintendent of education as allowed by the county board of education of Coosa County. Following is a copy of the action of the board of education in filling the position of the county superintendent and in fixing his salary:

"The President, Mr. J. A. Embry, declared that the floor was open for the nomination of a Superintendent of Education for the county for term beginning July 1, 1939. Mr. W. F. Darden placed in nomination J. G. Pinson for Superintendent for a term of four (4) years, beginning July, 1939, at a salary of \$2,000.00 per annum to be paid in monthly installments of \$166.66 $\frac{2}{3}$, and with an expense allowance of \$800.00 per annum to be paid in regular monthly installments of \$66.66 $\frac{2}{3}$, and Mr. P. O. Gilliland, seconded the nomination. There being no other nominations, the President called for a vote and J. G. Pinson was unanimously elected.'

"The three points raised are as follows:

"1. Is it necessary for a superintendent appointed under the State General Law to submit at the end of each month an itemized and sworn statement of travel and other expenses incurred by him during the month?

"2. Is this expense allowance supposed to cover only his expense incurred in traveling within his county or can it be implied to cover his expense when he travels beyond the border of his county on business for his school system?

"3. If it is necessary for the superintendent to file an itemized account of his official travel, what would be the rate per mile to charge for such travel?"

It is my opinion that your first question should be answered in the negative.

It has heretofore been decided that County Boards of Education operating under the General Laws of the State have authority under Section 149 of the School Code of 1927 to fix a reasonable expense allowance for the County Superintendent of Education as a part of his compensation, provided same is done at the time the County Superintendent of Education is appointed. Biennial Report of Attorney General, 1934-36, page 263; Biennial Report of Attorney General, 1936-38, page 121.

The above procedure seems to have been followed in the instant case. Therefore, the allowance of the expense account as a part of the compensation is valid, and the only question that remains is the intent of the County Board of Education as evidenced by their resolution heretofore set out.

It is my opinion that the County Board of Education intended for the County Superintendent of Education to be allowed as a part of his compensation \$66.66 $\frac{2}{3}$ every month for his traveling expenses and that he receive this amount every month. In my opinion this intent is clear. It is not necessary for the County Superintendent of Education, appointed under

the General Laws of the State, to file an itemized and sworn statement at the end of each month to entitle him to such an expense allowance as a part of his compensation. Cf. the recent opinion of the Attorney General to Hon. I. C. Heck, State Comptroller, under date of April 8, 1940.

Answering your second inquiry, it is my opinion that the action of the county board of education, reflected in its resolution incorporated in your request, contemplates that the compensation thereby fixed covers all of the services of the county superintendent of education, including his travel within and without the county. Cf. **Woodruff v. Beeland**, 220 Ala. 652., 127 So. 235.

An answer to your third inquiry is unnecessary, in view of my conclusions upon your first inquiry.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 19, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Department of Public Safety—Highway Patrol Act—Costs and
Fees—Recorders' Courts—

1. Where a person is tried for violating the State highway laws in a recorder's court, the recorder should assess and collect such costs as are ordinarily assessed and collected in such recorder's court.
2. Where a person is tried for violating the State highway laws in a recorder's court, the recorder, as to fines and punishment, is to be governed by schedule of fines imposed by the State laws and fix punishment as prescribed by State laws.
3. All patrolmen's fees and fines collected by a recorder, when such recorder tries a person for violation of State highway laws, should be remitted by recorder as provided by the State laws.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for an official opinion under date of March 13, 1940, as follows:

"Please refer to Sections 1935 and 1946, and other pertinent statutes of the 1923 Code, and advise me on the following:

"1. When a City Recorder tries and convicts a defendant for violating a State Highway law, is the Recorder bound and governed by the State laws that bind and govern Justices of the Peace as to costs?

"2. If a City Recorder tries and convicts and collects a fine for violating a State Highway Law, should not the fine be remitted by him to the State Department of Public Safety?

"3. If a State Highway Patrolman arrests a person for violating a State Highway law and carries the case to a City Recorder's Court for trial, if the defendant is convicted and pays off, should not the Patrolman's fees be remitted by the Recorder to the State Department of Public Safety?

"As these questions are now confronting us in our official work, I should much appreciate an early reply."

Subsequent to the date of the above request, I am advised that the offenses to which you refer in said request are driving upon the public highway while under the influence of intoxicating liquor, and violations of Act No. 181, H. 245, approved March 13, 1939 (General Acts, 1939, page 300), which act is known as the Highway Patrol Act. Therefore, I will only deal with those offenses in this opinion.

My answer to your first inquiry is in the negative.

Section 1935 of the Code of Alabama, 1923, reads as follows:

"Section 1935. Recorders; jurisdiction, powers and duties of.—It shall be the duty of the recorder to keep an office in the city, and hear and determine all cases for the breach of the ordinances and by-laws of the city that may be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority."

It appears from the above quoted section that a recorder shall have and exercise the jurisdiction and powers of an ex-officio justice of the peace.

Subsection (e) of Section 11 of Act No. 181, supra, provides in part as follows:

"Justices of the Peace or Notaries Public ex-officio Justices of the Peace in their respective counties shall have jurisdiction but not exclusive jurisdiction to try any person charged with violation of this Act and shall be authorized to impose the penalties herein provided upon conviction. * * *"

It affirmatively appears from the above that justices of the peace have jurisdiction of offenses created by Act No. 181, *supra*.

The Supreme Court of this State in the case of **Pharr v. Whittle**, 237 Ala. 124, 185 So. 895, expressly held that a justice of the peace has jurisdiction of the offense of driving a motor vehicle upon the public highways while under the influence of intoxicating liquors.

Section 1945 of the Code of 1923 reads as follows:

"Section 1945. Recorder; concurrent jurisdiction with county court; judgment of one, bar to prosecution.—The recorder shall have original and concurrent jurisdiction with the county court or court of like jurisdiction, of all misdemeanors committed within the city or town, or within the police jurisdiction thereof, but no fine or judgment of acquittal or conviction rendered by said recorder shall be a bar to a prosecution by the state in any case where the facts or offense charged constitute a felony under the laws of the state of Alabama. When a person has been tried and convicted of any offense, which is a misdemeanor under the state laws, by a municipal officer empowered by law to try such offense, he shall be punished as provided by law."

The appellate courts of this state have held on numerous occasions that when a recorder is trying a person for the violation of a State law under the authority of the above quoted statute, such recorder must impose the punishment and fix the fine according to the State law. **Culpepper v. Adams**, 1 Ala. App. 536, 55 So. 325; **Jones v. State**, 3 Ala. App. 229, 57 So. 1031; **Rowell v. State**, 27 Ala. App. 158, 167 So. 605; Section 1946, Code of Alabama, 1923.

However, in my opinion, the above, as to the procedure which a recorder should follow when he is trying a person for violation of State law, only applies to the procedure in so far as it applies to the imposition of the punishment for the offense and fixing the fine in connection with the offense. I do not believe that the above applies to costs accruing in a recorder's court when a recorder is trying a person for violating a state law. The recorder is sitting as the recorder's court even though he is exercising concurrent jurisdiction with justice of the peace courts and county courts and, in my opinion, the same costs and fees should be assessed and collected as are ordinarily assessed and collected in such recorder's court. Cf. Biennial Report of Attorney General, 1920-22, p. 177; **Dowling v. City of Troy**, 1 Ala. App. 508.

Your second and third inquiries are so interrelated that I will proceed to answer both of said inquiries together.

Subsection (f) of Section 11 of Act No. 181, *supra*, reads in part as follows:

"All fines, penalties or forfeitures imposed under the provisions of this Act shall be forwarded immediately upon the collection of the same by the officer of the court who collects the same to the Director of Public Safety, * * *"

Section 13 of Act No. 181, *supra*, reads in part as follows:

"* * * provided, however, that no State Highway Patrol Officer shall be entitled to any costs, fees or mileage for attending any courts, but instead, the proper authorities shall collect such costs, fees and mileage that are due such officers for attendance on any court or for any official act and promptly turn the same over to the Director of Public Safety who shall cover the same into the Highway Patrol Fund, * * *."

Section 2 of Act No. 198, S. 22, approved March 4, 1937 (General Acts, 1936-37, page 228), which act prescribes the punishment for driving a motor vehicle upon the public highways while intoxicated, reads as follows:

"Section 2. All fines collected for the violation of this Act shall be paid into the Highway Patrol Fund, as now provided by law."

You are, therefore, advised that, based upon the above cited authorities, it is my opinion that a recorder who collects fines and patrolmen's fees, if any are provided by city ordinance, growing out of convictions in his court for violating Act No. 181, supra, and Act No. 198, supra, should remit all such fines and patrolmen's fees as directed in said acts.

My answer to both your inquiries No. 2 and No. 3 is, therefore, in the affirmative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1940.

Hon. W. P. Slaughter, Chairman,
Barber Commission of Jefferson County,
Room 603, Court House,
Birmingham, Alabama.

Barber Commission of Jefferson County—

Barber Commission held without authority to make rules or regulations governing the display of signs advertising prices charged for services rendered in barber shops.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 3, 1940, in which you request my opinion as follows:

"In re: Power of Barber Commission of Jefferson County, Alabama to enact rule or regulation prohibiting the display of signs on windows of barber shops of prices charged in said shops.

"The Barber Commission of Jefferson County, Alabama, created by the General Acts of Alabama of 1931, page 615, as amended by General and Local Acts of 1936, page 72 and General and Local Acts of 1936, Extra Session, page 74, is confronted in this County with the problem of numerous barber shops displaying signs of prices charged far below the normal level or schedule of prices.

"For example, numerous shops are displaying signs advertising that haircuts can be secured for \$.20 or \$.30. It is the considered opinion of the Barber Commission that such signs, so displayed, are detrimental to the health and sanitation of the State and of the purposes of the Barber Commission Act.

"I would appreciate you informing us whether the Barber Commission of Jefferson County, Alabama, has the power or authority to enact rules or regulations prohibiting the display of signs advertising the price of haircuts in the windows or on signs around said barber shops."

The act in question is Act No. 508, H. 1022, which became a law July 24, 1931, under the provisions of Section 125 of the Constitution (General Acts, 1931, page 615).

This act was last amended by Act No. 113, H. 123, approved April 14, 1936 (General and Local Acts of 1936, page 71).

I have searched the original act above cited and the amendments thereto, but I find no provisions of either the original act or of the amendments thereto relating to the placing of signs displaying prices charged for services by barbers. It is my opinion that the Barber Commission is without authority to make rules or regulations governing the display of signs advertising prices charged for services rendered in barber shops.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1940.

Hon. Ira Davis,
Sheriff, St. Clair County,
Ashville, Alabama.

Sheriffs—Arrest Fees and Guard Allowances.

Each time a defendant is arrested on warrant, alias capias or pluries capias and committed to jail, the sheriff would be entitled to arrest and guard fee.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 15, 1940, in which you request my opinion as follows:

"I am enclosing herewith copy of a part of the record in the office of the Circuit Court which deals with the case of State vs. Rufus Gann.

"You will note that he was first arrested 9-16-31. This particular arrest being made by Hon. Ab Crow the former sheriff. You will also note that the case was passed from time to time until 7-3-36 at which time it was withdrawn and filed.

"On 10-6-39 a pluries capias was placed in my hand. I arrested him and committed him to jail 11-20-39. On 12-18-39 he pled guilty and was sentenced for one year, but was put on probation for five years and the State was taxed with the cost.

"Under facts stated above, please advise me as follows:

"1. Is the clerk supposed to include two arrest and guard fees in her cost bill to the State?

"2. If the State is liable for only one arrest and guard fee, who is entitled to same, the former sheriff or myself?

"3. If the State is liable for only one arrest and guard fee and I am not entitled to same, please advise me how I am to collect for making the last arrest and committing him to jail?"

My answer to your first request is in the affirmative. In so holding, I am assuming that each time the defendant was arrested, he was committed to jail. You say that on November 20, 1939, you arrested the defendant on a pluries capias and committed him to jail. This would entitle you to an arrest fee and guard allowance. You do not say that the defendant, when arrested by your predecessor, was placed in jail. If he was not, then in this event Mr. Crow, the former sheriff, would only be entitled to arrest fee. By not having committed him to jail, he could not collect a guard allowance. (Quarterly Report Attorney General, Vol. 18, page 86). I also call your attention to an opinion of this office written March 27, 1940, to Hon. W. H. Quillin, Judge of the Law and Equity Court, Franklin County, a copy of which I am enclosing.

The answer to your first inquiry eliminates the necessity for an answer to your second and third requests.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 22, 1940.

Hon. I. J. Browder,
State Personnel Director,
Personnel Department,
Montgomery, Alabama.

Merit System—Provisions of Merit System Act, Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68), held to control the amount and payment of the salary of Secretary to the Alabama Pension Commission.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 22, 1940, in which you request my opinion as follows:

"I was directed by the State Personnel Board to request an opinion from you as to whether or not the salary of the Secretary of the Alabama Pension Commission may be raised from \$150.00 per month to \$200.00 per month as requested by the Pension Commission.

"Senate Bill 314, Section 2, (approved September 16, 1939) states that 'the secretary shall receive a salary of \$1800.00 per annum, payable as the salaries of other State employees are paid and shall be subject to all provisions of the Merit System Act.'

"The Legislature, however, appropriated \$2500.00 for expenses of the office. No other employees are necessary. So the Commission has recommended to the Personnel Board that the salary of the secretary be raised to \$200.00 per month."

In reply, I wish to advise that it is my opinion that full authority to set the salary of the Secretary to the Alabama Pension Commission is vested in the State Personnel Board.

I wish to refer you to Act No. 483, S. 314, approved September 16, 1939 (General Acts, 1939, p. 684) which provides in part as follows:

"Section 2. That the State Auditor shall appoint a secretary to the Alabama Pension Commission who shall perform such duties as are required by the rules, regulations and directions of said Commission. The said secretary shall receive a salary of eighteen hundred dollars per annum, payable as the salaries of other State employees are paid, and shall be subject to all the provisions of the Merit System Act."

I wish to further refer you to Act No. 247, S. 239, approved August 24, 1939 (General Acts, 1939, p. 411), which appropriates the necessary money for the salaries of employees of the Pension Commission as follows:

"For salaries, \$2,500.00."

Section 13 of the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts 1939, p. 68), provides as follows:

"Section 13. PAY PLAN. After consultation with appointing authorities and the State fiscal officers, the Director shall prepare and recommend to the Board a pay plan for all employees in the state service. Such pay plan shall include, for each class of positions a minimum and a maximum rate, and such intermediate rates as the Director considers necessary or equitable. In establishing such rates the Director shall give consideration to the experience in recruiting for positions in the state service, the prevailing rates of pay for the services performed, and for comparable services in public and private employment, living cost, maintenance or other benefits received by employees, and the State's financial condition and policies. Such pay plan after adoption by the Board, shall be submitted to the Governor, who shall have the power to revise or alter the plan. Such pay plan shall take effect when approved by the Governor. Amendments thereto may from time to time, be made in the same manner. Each employee in the state service shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed."

You will note that the Merit System Act was approved on March 2, 1939, while Act No. 483 S. 314 was approved September 16, 1939, and is made referable to the Merit System Act above cited. The provisions of Act No. 483, S. 314, approved September 16, 1939, governing the salary of the Secretary to the Pension Commission sets the salary of the Secretary of the Pension Commission at \$1,800.00 per annum, payable as the salaries of other state employees are paid, and further provides, "and shall be subject to all the provisions of the Merit System Act." These provisions of law can not be said to state the intention of the Legislature without ambiguity. The doubt concerning whether or not it was the intention of the Legislature that the salary of the Secretary of the said Pension Commission should be subject to the provisions of the Merit System Act is removed by reference to Act No. 552, S. 338, approved September 19, 1939 (General Acts, 1939, p. 872) which provides as follows:

"Section 1. That all provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all of the State Officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding.

"Section 2. That all laws and parts of laws, general, special or local, in conflict with the provisions of this Act are hereby repealed.

"Section 3. That this Act shall go into effect upon its passage and approval by the Governor or its otherwise becoming a law.

"Approved September 19, 1939."

All the above named statutes in so far as the control of the provisions of the Merit System Act over the salaries and employment of state employees is concerned, relate to the same subject and have the same general purpose. The rule for construction of statutes under circumstances of this kind has been stated by our Supreme Court in the case of **American Standard Life Ins. Co. v. State**, 226 Ala. 383, 147 So. 168, as follows:

"In construing a particular statute, all statutes relating to the same subject or having the same general purpose should be read in connection with it as together constituting one law."

Premises considered, it is my opinion that the legislative intention becomes apparent when the provisions of all the above cited statutes are construed together, and that the provisions of Act No. 483, S. 314, supra, which provides that the salary of the Secretary of the Alabama Pension Commission shall be \$1,800.00 per annum is controlled by the provisions of Act No. 552, S. 338, cited supra, in which it is provided that the provisions of the Merit System Act, approved March 2, 1939, shall be applicable to all state officers and employees covered thereby at the time of its enactment, any other statutes or provisions of law subsequently enacted to the contrary notwithstanding.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 23, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Taxation — Municipal Taxes—

Assessment and collection of by county tax assessor and collector, including sale of property for nonpayment of said taxes and the redemption of property so sold, pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57, H. 183, approved February 27, 1939 (General Acts, 1939, p. 67) further discussed.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of January 5, 1940, in which you request my opinion as follows:

"Please refer to your opinion to Hon. J. Collier Merrill, Tax Collector, Covington County, as reported in Quarterly Report for period April 1, 1939 through June 30, 1939, Vol. XV, page 231, and advise me as follows:

"1. Would the following advertisement meet all requirements where the entire property assessed is subject to State, County and City Taxes?:

(Proper Collector's Notice)

"Owner Unknown

Lot 10 in Block 17 of South 10th Street and one 5 room dwelling house.

State and County Tax, fees and costs.....	\$5.00
City of..... Tax, fees and costs.....	2.50
Total	\$7.50

"2. If the above advertisement will not meet all requirements, please set out a proper example.

"3. Should the fees of officers be made a part of the total amount due under State and County Taxes or should same be prorated between the State and County and City? (Such fees are payable to the officers only upon redemption.)

"4. If such fees should be prorated, upon what basis should same be prorated?

"5. Should the costs, such as advertising, etc., be made a part of the total amount due under State and County Taxes or should same be prorated between State and County and City? (It appears from the Comptroller's record that the State has been paying all cost of advertising where taxes are being collected under the 1931 act.)

"6. If such costs should be prorated, upon what basis should same be prorated?

"7. If such costs should be prorated, should the State pay the total costs and then collect from the City its pro rata share or should the newspaper bill the State for the amount due for State and County and the City for amount due by such City? (This would cause a warrant to be drawn payable to the city upon the redemption or sale of same, whereas when the State pays all advertising, same is certified as a collection of advertising upon redemption, etc.)

"8. Where property is sold for both State and County and City taxes, does the Judge of Probate bid in the total amount due for the State or does he bid in the amount due for State and County taxes for the State and the amount due City taxes for the City?

"9. If the Judge of Probate bids in same for each separate, does he issue two certificates and who gets such certificates.

"10. Can the Judge of Probate name any term of court to hear objections on the decree to sell property for taxes? (In other words, does he have to set the April term of Court to hear all cases or can he set the time for the May or June term?)

"11. Would the following advertisement meet all requirements where part of the property assessed is subject to State, County and City taxes and part of same is subject only to State and County taxes?

"(Proper Collector's Notice)

"Owner Unknown

"Property subject to State, County and City of _____ tax.
Lot 10 in Block 17 of South 10th Street and one 5 room dwelling house.

"Property subject only to State and County tax, S. E. qtr. of N. W. qtr. of Sec. 2 T. 4, R. 6

State and County tax, fees and costs	\$10.00
City of _____ tax, fees and costs	2.50
Total	\$12.50

"12. If the above advertisement will not meet all requirements, please set out a proper example.

"13. When such property is redeemed, etc., should only the amount of city taxes for which it was sold be collected or should such amount together with subsequent years city taxes be collected? (The title to the property is vested in the State of Alabama as of the previous October 1st and State property is not subject to city taxes.)

"14. Where part of the property is subject to State, County and City taxes and part of same subject only to State and County taxes, would the advertisement as set out in question 11 or the substitute requested in question 12, fully set out in the certificate of sale as advertised be sufficient to meet all requirements?"

Your inquiry calls for a further consideration and discussion of the general subject of the assessment and collection of municipal taxes by the county tax assessor and collector, including the sale of property for non-payment of said taxes, and the redemption of property so sold, pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57, H. 183, approved February 27, 1939 (General Acts, 1939, p. 67).

This general subject has been previously considered and discussed, in various aspects, in opinions of this office to Hon. J. Collier Merrill, Tax Collector, Covington County, Andalusia, Alabama, under date of May 27, 1939, Quarterly Report of Attorney General, Vol. XV, p. 231; to Hon. J. Charles Stanley, Tax Assessor, Calhoun County, Anniston, Alabama, under date of October 30, 1939, Quarterly Report of Attorney General, Vol. XVII, p. 170; to Hon. R. E. King, Tax Collector, Mobile County, Mobile, Alabama, under date of December 7, 1939, Quarterly Report of Attorney General, Vol. XVII, p. 363; to Hon. Coley Page, Tax Collector, Jackson County, Scottsboro, Alabama, under date of March 28, 1940; and to Hon. J. Fred Gurley, Tax Collector, Calhoun County, Anniston, Alabama, under date of April 1, 1940. Copies of the two opinions last cited are herewith enclosed for your information. These opinions shed much light upon the proper answers to the specific inquiries which you now propound, and they will be relied upon heavily in our answers to the same.

Section 201 of the 1935 Revenue Act, as amended, supra, reads as follows:

"Section 201. Any municipal corporation in this State may, by ordinance duly adopted, provide for the assessment, equalization and collection of taxes due such municipality, by the officers and boards provided for the assessment, equalization and collection of State and County taxes, the enforcement of such collection, the sale of property for the collection of taxes and the redemption from such sales, shall be applicable to the assessment and collection of such municipal taxes, the sale of property for the collection of such municipal taxes and the redemption from such sales, and the assessor and collector shall receive such compensation as may be fixed by the governing body of such municipality, not to exceed one-half of one per cent for collection, and if any municipal corporation has heretofore availed itself of the provisions of this section or shall hereafter do so by the adoption of an ordinance as provided for herein, there shall also be applicable to the assessment and collection of its taxes, the sale of property for the collection thereof, and the redemption from such sales, all such other machinery, procedure and provisions of law as are now applicable with respect to the assessment, levy and collection of municipal taxes of cities having a population of not less than 6,500 nor more than 15,000, according to the last or any subsequent Federal Census. And such machinery, procedure, and provisions shall apply to all uncollected taxes whether heretofore or hereafter assessed, provided the municipal corporation has heretofore adopted such ordinance." Emphasis supplied)

The act referred to in said Section 201, as amended, supra, is Act No. 300, H. 864, approved June 26, 1931 (General Acts, 1931, p. 337).

Your specific inquiries will be considered seriatim.

1. The advertisement or publication set out in your first inquiry is not sufficient to meet all requirements where the entire property assessed is subject to State, County and City taxes, for the reasons set out hereafter in answer to your second inquiry.

2. The following advertisement or publication will meet all requirements (See Section 224 of the 1935 Revenue Act) where the entire property assessed is subject to State, County and City taxes:

(Proper Collector's Notice)

"Owner unknown.

Lot 10 in Block 17 of South 10th Street and one 5 room dwelling house.

State and County Tax and costs	\$5.00
City of..... Tax and costs	2.50
Total.....	\$7.50"

See the answer to question number twelve in the opinion to Mr. Merrill, supra, holding that advertisement or publication given by the tax collector must separately describe the municipal property from the rural property, separately state the municipal taxes, together with interest and charges thereon, but all in the same advertisement or publication, and not in separate advertisements or publications.

You will note that the different between the suggested advertisement or publication set out in your inquiry 1 and the one set out in my answer to this inquiry is in accordance with the holding of an opinion of this office to Hon. J. W. Hamilton, Tax Collector, Jefferson County, Birmingham, Alabama, under date of February 12, 1940, copy of which is herewith enclosed for your information.

3. The fees of officers, such as the fee of the tax collector for making demand on a delinquent taxpayer provided for by Section 162 of the 1935 Revenue Act, should be made a part of the total amount due under State and County tax and costs, and should not be prorated between the State, County and City. Such fees attach by reason of the various officials which duties in the premises performing those duties with reference to State and County taxes, and the fact that the City taxes are also assessed and collected by the County authorities does not call for any additional fees. In common parlance, so far as the fees of officers are concerned, the City taxes get a free ride. See opinions to Mr. Page and Mr. Gurley, *supra*. This being true, i. e., since these fees attach irrespective of whether the City taxes are included, there is no reason or authority for them being prorated between the State, County and City.

4. The answer hereinabove given to your inquiry number three obviates the necessity for an answer to your fourth inquiry.

5. The costs of advertising, etc., should be included in the total amount due under State and County tax and costs, and should not be prorated between the State, County and City. Section 233 of the 1935 Revenue Act provides for the State to pay the costs of advertising property bid off for the State, but is silent in regard to proration. It is my information that heretofore where only State and County (including school) taxes were involved, the State has paid all the costs of advertising, without prorating it between the State, County and schools. Likewise, I am informed that where City taxes have heretofore been assessed and collected under Act No. 300, *supra*, the State has paid all the costs of advertising without the same being prorated between the State, County, schools and City. At first blush, this would seem to place an unfair burden on the State but, when the State's certificate of purchase is assigned, or the property is later redeemed, or sold after the period of redemption has expired, these costs are collected (Sections 235, 269, as amended by Act No. 55, H. 24, approved March 26, 1936 (General Acts, 1936, p. 30), 279 and 281 of the 1935 Revenue Act), and the State is thus reimbursed for the amount which it has previously paid for the costs of advertising. Even so, it might be contended that the State is burdened under this procedure, since it has advanced money for the use of the County, schools, and City for all of the time intervening between the date on which the property is bought in by the State is assigned, the property is redeemed, or sold after the period of redemption has expired, as the case may be. However, if this procedure is not followed, and the costs of advertising are prorated between the State, County, schools and City, with each being required to pay a part of the costs of advertising in proportion to its interest in the total taxes involved, and they are then reimbursed in proportion to the amount so paid when the State's certificate of purchase is assigned, the property is redeemed, or sold after the period, as the case may be, the expense involved in such a procedure would be prohibitive. The procedure heretofore followed, i. e., the plan of having the State pay all the costs of advertising, without proration thereof between the State, County, schools and City, seems to be the best practical method of handling the matter. It is a reasonable construction of Section 233, *supra*. It is the ad-

ministrative construction heretofore placed on the applicable statutes (Section 233 and its predecessors in our statutes) over a long period of years. It is entitled to great weight. I am not willing to overturn it and, consequently, it is here approved.

While not controlling, an administrative construction of a statute, the application and meaning of which is doubtful, is entitled to great weight and consideration, especially if it has prevailed for a considerable time. **State v. Tuscaloosa Building & Loan Association**, 230 Ala. 476, 161 So. 530; **State ex rel. Fowler v. Stone**, 237 Ala. 78, 185 So. 404; **Waters v. State**, 25 Ala. App. 144, 142 So. 113.

The answer to the inquiry numbered "second" in the opinion to Mr. King, *supra*, which was given without a consideration of Section 233, *supra*, and the administrative construction heretofore placed upon it and its predecessors in our statutes, is in conflict with the answer hereinabove given, and is hereby overruled.

6 and 7. The answer hereinabove given to your inquiry number five obviates the necessity for an answer to your inquiries numbered six and seven.

8. Where property is sold for State, County and City taxes, the Judge of Probate, as the agent of the State, bids in the property for the State for the total amount due for State, County and City taxes, etc. See Sections 23, 25, 29 and 30 of Act No. 300, *supra*, and the answer to question number fourteen in the opinion to Mr. Merrill, *supra*.

9. The Judge of Probate issues only one certificate of purchase in such a case, which certificate is made to the State, the purchaser. See Sections 23 and 25 of Act No. 300, *supra*, and the answers to questions numbered thirteen and fourteen in the opinion to Mr. Merrill, *supra*.

10. The Judge of Probate must name the next term of court following the date of notice to the taxpayer for hearing objections as to why a decree for the sale of property for the payment of the taxes thereon, together with fees and costs, should not be made, but such cause, if contested, may be continued to the next succeeding term, provided the written consent of the taxpayer and the tax collector is filed in the case and noted on the docket. See Sections 217 and 220 of the 1935 Revenue Act; the answer numbered 2 in the opinion to Mr. King, *supra*, and opinion to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of July 5, 1938, Quarterly Report of Attorney General, Vol. XII, p. 37.

11. The advertisement or publication set out in your eleventh inquiry is not sufficient to meet all requirements where part of the property assessed is subject to State, County and City taxes and part of same is subject only to State and County taxes. See the reasons given in the answer to your inquiry numbered two as to why the advertisement or publication set out in your first inquiry was not sufficient to meet all requirements where the entire property assessed is subject to State, County and City taxes.

12. The following advertisement or publication will meet all requirements (See Section 224 of the 1935 Revenue Act) where part of the property as-

sessed is subject to State, County and city taxes and part of the same is subject only to State and County taxes:

"Owner Unknown.

Property subject to State, County and City of _____ tax.

Lot 10 in Block 17 of South 10th Street and one 5 room dwelling house.

"Property subject only to State and County tax. S. E. qtr. of N. W. qtr. of Sec. 2, T. 4, R. 6

"State and County tax and costs	\$10.00
City of tax and costs	2.50
Total	\$12.50"

See my answer to your question numbered two.

13. When property, which has been sold for State, County and City taxes, and purchased by the State at tax sale, is redeemed, in addition to the amounts collected for the State and County, there should be collected for the City the amount of the City taxes and costs for which the same was sold, together with an amount equal to City taxes for subsequent years. See Section 269 of the 1935 Revenue Act, as amended, *supra*, and Sections 28, 29 and 34 of Act No. 300, *supra*, and the answer to question number sixteen in the opinion to Mr. Merrill, *supra*. In opposition to this conclusion, it might be contended that to require the collection of an amount equal to the City taxes for the subsequent years when such property is redeemed is, in effect, allowed the City to tax the property of the State, which the City does not have the authority to do. See opinion to Hon. J. W. Rutland, Tax Assessor, Colbert County, Tuscumbia, under date of June 28, 1939, Quarterly Report of Attorney General, Vol. XV, p. 335. The answer to this contention is that these amounts which the Legislature has fixed to be paid upon redemption of property are not strictly speaking taxes, but are merely amounts which the Legislature has required to be paid, which amounts approximately represent the amount of taxes which would ordinarily be due. See opinion to Hon. Eugene H. Hawkins, Judge of Probate, Jefferson County, Birmingham, Alabama, under date of November 22, 1935, Quarterly Report of Attorney General, Vol. 1, pp. 207, 210. A reading of Act No. 300, *supra*, shows very clearly that it was the intention of the Legislature that upon the redemption of property which had been sold for State, County and City taxes and purchased by the State at such tax sale, the amounts which would have accrued as City taxes for subsequent years except for the tax sale shall be computed and collected along with the amounts which would have accrued for State and County taxes for the subsequent years except for the tax sale. It seems to me that if the Legislature has the power to fix amounts for the redemption of property which shall approximate State and County taxes which would have accrued except for the tax sale, it likewise has the power to include in such amounts a sum which shall approximate the City taxes which would have accrued except for the tax sale.

14. Where part of the property sold is subject to State, County and City taxes, and part of the same is subject only to State and County taxes, the

property may be described and the amount of taxes due thereon may be set out in the certificate to the purchaser in the same manner that it is described and the amount of the taxes due thereon is set out in the advertisement or publication, but the certificate must also contain all the other information required by Sections 231 and 232 of the 1935 Revenue Act, and should be made in strict conformity with the provisions of those sections. See my answer to your inquiry numbered twelve and Section 23 of Act No. 300, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 24, 1940.

Hon. Joe S. Daniel,
Tax Collector,
Cherokee County,
Centre, Alabama.

Tax Collectors—Sale of Personal Property—Decedents' Estates—

It is duty of tax collector to levy on and sell the personal property belonging to a decedent's estate for payment of delinquent taxes assessed against said decedent, or any unpaid balance thereof, before taking proceedings to sell any of the real estate belonging to said estate or belonging to decedent on October 1st next prior to his death. Sections 170 and 215 of Revenue Act of 1935.

No property belonging to decedent's estate is exempt from sale for payment of delinquent taxes assessed against said decedent. Section 172 of Revenue Act of 1935.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of April 17, 1940, in which you request my opinion as follows:

"Certain lands in Cherokee County, Alabama, were assessed to H. H. Scroggin for the year 1939. On July 30th, 1939, H. H. Scroggin died. Thereafter and on August 17th, 1939, the widow of decedent was appointed administratrix of the estate of decedent, and from her petition for Letters of Administration it appears that the personal property of said estate consisted of household goods and an automobile.

"Decedent had sometime before his death deeded all of his land to his wife and several children whereby he deeded each a certain separate tract, reserving in each tract a life estate unto himself.

"A part of the taxes due on the lands assessed by decedent have been paid, the widow and all children but one having paid what they considered their pro rata part according to the share of the estate received by them. There remains an unpaid balance due on the assessment of decedent which it appears will not be paid, as one child contends that the taxes should be collected out of the personal property of decedent's estate, and the widow and all other children contend that the remaining unpaid taxes should be collected out of the real estate which was deeded to child who has paid no part of the taxes.

"Please give me an opinion on the following question:

"In the event the balance of the taxes due on the assessment made by said decedent during his life time are not paid what is my duty as Tax Collector of Cherokee County, Alabama, as to what property to sell?"

Under Section 170 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256), it is the duty of the tax collector after January 1 each year, "without delay, to levy upon the personal property of delinquent taxpayers for the payment of their taxes" and after complying with the further provisions of said section as to notice thereof to sell said property.

No personal property of any nature whatsoever shall be exempt from such levy and sale (Section 172 of the Revenue Act of 1935, *supra*).

Under Section 177 of the act, in case of insufficiency of the personal property for payment of taxes, the taxpayer's real estate should be sold for the payment of such taxes or the balance due thereon, in accordance with procedure prescribed by Sections 214 et seq. of said act.

I am of opinion, therefore, that you should first levy upon the household goods and automobile of the above named decedent and sell the same in the manner prescribed by the above cited statutes before attempting to sell any real estate subject to sale for taxes for the year 1939.

Should the proceeds of the sale of the household goods and automobile be insufficient to pay the balance due, then, of course, you should take such further steps as may be authorized with reference to the sale of real estate as above indicated.

The fact that decedent before his death conveyed his real estate to various children, reserving unto himself a life estate, and the fact also that partial payments have been made for, and on account, of the taxes due on the real estate does not affect the result.

See also in this connection opinion rendered June 27, 1934, to Hon. Hodges Crow, Tax Collector, Decatur, Alabama, (Biennial Report of Attorney General 1932-34, p. 582); opinion rendered October 10, 1939 to Hon. Elmer L. Vincent, Tax Collector, Limestone County (Quarterly Report of Attorney General, Volume XVII, page 65).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 24, 1940.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Probate Judges—Marriage—Irregularity in issuing licenses—

Marriage solemnized under license issued in county other than where woman resides or in county other than where the ceremony is performed is legal and valid.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of April 11, 1940, in which you request my opinion as follows:

"Will you please advise if a couple marrying must be married in the county in which the marriage license is issued? Section 8998 of the 1923 Code of Alabama states 'that license must be issued by the Judge of Probate of the County in which the woman resides, or in which the ceremony is to be performed.' If a license is secured in the county in which the woman resides, is it legal to go into another county and marry, or if a license is secured in the county where neither the woman nor man reside can they take this license over to another county and marry legally?"

My answer to your first inquiry is in the negative.

Section 8998 of the Code of 1923 reads as follows:

"8998. Not to be solemnized without license.—No marriage shall be solemnized without a license, to be issued by the judge of probate of the county in which the woman resides or in which the ceremony is to be performed; which license is an authority to any one qualified to solemnize marriage to join together in matrimony the persons therein named."

The Supreme Court of this State in the case of **Wallace v. Screws**, 227 Ala. 183, 149 So. 226, has in effect held that the provision of the above quoted section, in so far as the issuance of a marriage license is concerned, are merely directory. The facts in the Wallace case, supra, were as follows:

The woman was at the time of the marriage a resident of Chilton County, the marriage was performed in Dallas County by virtue of a marriage license issued in Jefferson County. The Supreme Court, after taking cognizance of the above facts, held that even though the license was irregularly issued, this irregularity in the issuance of the license did not render the license void or affect the validity of the marriage. The Court cited as authority for so holding the case of **Ely v. Gammel**, 52 Ala. 584, which is a very old case but

has been followed many times by our courts, and the doctrine therein pronounced is still the law in this State.

My answer to your second inquiry is in the affirmative, that is to say, a couple may be united in marriage in a county other than the county in which the woman resides by virtue of a license secured in the county of the residence of the woman. **Wallace v. Screws**, supra.

My answer to your third question is also in the affirmative. That is, a couple may be legally united in marriage in a county other than the county in which the marriage license is secured, even though neither party to the marriage resides in the county where the license is secured or the marriage is performed. **Wallace v. Screws**, supra.

You are therefore advised that, in my opinion, a couple who desires to be joined in the holy state of matrimony, after procuring a license in one county, may legally and validly be united in marriage in any other county of the State.

However, it is my opinion that the several probate judges throughout the State, for their own protection, when issuing marriage licenses, should follow the directory provisions of Section 8998, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 24, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Franklin County—Court of County Revenues—Compensation of members—

Members of Court of County Revenues of Franklin County are authorized to be paid 5c for each mile necessarily travelled in the performance of their duties in letting out, inspecting and accepting, building or repairing of county roads, bridges, buildings or works, when acting under authority of order of court previously made, or in emergency as is provided by Section 6771 of the Code of 1923, as amended by Section 6771 of Michie's 1936 Cumulative Supplement to the Code of 1928.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of December 14, 1939, requesting my opinion as follows:

"Please refer to Local Acts of 1900-1901, page 1205, and advise me in answer to the following:

"1. Can the members of the Court of County Revenue of Franklin County legally draw mileage at the rate of five cents per mile?"

In my opinion, members of the county governing body of Franklin County, Alabama, are entitled to mileage at the rate of 5c for each mile necessarily traveled in the performance of their duties in connection with the letting out, inspecting and accepting, building or repairing, of any county bridges or county buildings or works, when acting under authority of an order of court previously made, or when acting in an emergency, as is provided by Section 6771 of the Code of 1923, as amended by Section 6771 of Michie's 1936 Cumulative Supplement to the Code of 1928.

One of the forerunners of the cited sections of the Code was Section 967 of the Code of 1896, which provided:

"The commissioners are entitled to \$2.50 per day for each day of actual service rendered 5c per mile for travelling to and from the sittings of the court, and such ferriage or toll as they may have paid in such travelling to be paid by the county treasury on the certificate of the judge of the court."

It will be noted that the section did not purport to provide any mileage to the commissioners for any travel except that to and from the sittings of the court.

By Act No. 479, S. 222, approved February 27, 1901, Acts of Alabama, 1900-01, page 1203, a change was effected in the compensation of the members of the county governing body of Franklin County.

Section 5 of said act provides:

"Be it further enacted, that the judge of probate shall receive only three dollars per day and each of said commissioners only three dollars per day for each day they are actually engaged in the performance of their duties as members of the court of said (sic) court of revenues."

Section 4 of said act provided:

"Be it further enacted, that all general laws hereafter enacted by the general assembly of Alabama in relation to the jurisdiction, power and authority or duties of said courts of county commissioners in this state shall apply to the court of county revenue as hereby established, except so much of said general laws as may relate to the mode of selecting members of said court of county commissioners."

At the time of the enactment of the statute applicable specifically to Franklin County, the duties of the county governing bodies with reference to county roads were limited. There were few roads, and their maintenance and the construction and maintenance of additional roads were not problems of much importance to the county governing bodies.

Section 957 of the Code of 1896 provided:

"The court possesses original jurisdiction in relation to the establishment, change or discontinuance of roads and bridges and causeways and ferries within the county to be exercised in conformity with the provisions of this code."

Section 2443 of the Code of 1896 provided:

"The court of county commissioners of the several counties is invested with the general superintendence of the public roads within their respective counties and may establish new, and change and discontinue old roads in the manner hereinafter provided."

Chapter 59 of the Code of 1896, of which Section 2443, supra, was a part, provided the general system for the county governing bodies to exercise their authority in relation to the public roads. The system generally contemplated that the county be divided into a convenient number of road precincts and that apportioners should be appointed for each precinct who should appoint road overseers in their precincts (Section 2454); the apportioners were required to assign persons liable to road duty to the several overseers, to inspect the roads, particularly as to their state of repair, and to make reports to the county governing body and to the grand jury as to the condition of the roads and as to the performance of their road duties by the citizens assigned to the several road precincts (Section 2468). The overseers were charged with the duty of superintending the persons subject to road work who reported to them for duty, of building bridges and causeways and generally of superintending the construction work on roads and bridges (Section 2470).

The statutes then in effect did not contemplate that members of the county governing bodies should give any appreciable amount of their time to the construction and maintenance of public roads or to the supervision and inspection of such construction and maintenance.

By Act No. 438, H. 785, approved October 1, 1903, General Acts, 1903, page 373, Section 967 of the Code of 1896, in effect, was amended by providing that members of county governing bodies should be paid for their services \$3.00 a day while occupied in the discharge of their duties as such members, and 5c per mile in going to and returning from sittings of their respective courts. The effect of this amendment was to increase the per diem of members of county governing bodies controlled by the general law from \$2.50 to \$3.00 per day, but no change in the allowance for mileage was made, so that they then were entitled to mileage only when going to and from sittings of the court.

This provision of law was carried forward, without change, as Section 3322 of the Code of 1907.

By Act No. 92, S. 134, approved August 25, 1909, Section 3322 of the Code of 1907 was amended by adding thereto a provision allowing members of county governing bodies compensation in "the sum of \$3.00 per day while occupied in the discharge of their duties in letting out, inspecting and accepting, building or repairing of any county bridges or county buildings or works and 5c per mile for each mile necessarily travelled by them in so doing, said sums to be paid in warrants drawn on the county treasury by order of the Court of County Commissioners or Boards of Revenue. And

providing further that no allowance shall be made to any commissioner for diem and mileage for inspecting roads, bridges, etc., except when acting under authority of an order of the Commissioners' Court previously made."

For the first time specific duties were imposed upon members of county governing bodies relating to the letting out, inspection, construction and maintenance of public roads, buildings and works within the county.

It is my opinion that, in view of these additional duties imposed on members of county governing bodies, which the changed conditions of the times made necessary, the Legislature intended that the provision of the Acts of 1909, cited supra, added to Section 3322 of the Code of 1907, affording compensation to the members of county governing bodies for the performance of such additional duties, should be applicable as well to those counties in which special provision as to compensation of members was in effect as to those governed by the provisions of the general law. Cf. *Yielding v. Ball*, 205 Ala. 376, 87 So. 785.

It is unthinkable that the Legislature intended that the members of the governing body of Franklin County, whose compensation was fixed by the special act at \$3.00 per day (as was the compensation of members of governing bodies of counties controlled by the general law, Code of 1907, Section 3322) should perform the duties added by the Act of 1909, supra, in the same manner and to the same extent that said added duties were to be performed by members of county governing bodies controlled by general law and that members of the Franklin County governing body should not be paid the compensation therefor which was provided by the Act of 1909, supra, to be paid to members of county governing bodies controlled by general law.

It is, therefore, my opinion that the provisions of the act of 1909, supra, which have been carried forward as Section 6771 of the Code of 1923 and as Section 6771 of Michie's 1936 Supplement to the Code of 1928, are applicable to the members of the county governing body of Franklin County; and that said provisions afford them compensation for each mile necessarily travelled in the performance of their duties in letting out, inspecting and accepting building or repairing of any county bridge or county buildings or works, when such duties have been authorized by previous order of the court or have been performed in an emergency as is provided by law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.
Traveling Expenses—

April 24, 1940.

Assistant Examiner of Public Accounts not entitled to per diem when working regularly in one place and returning to his home

every night, which home is located in another place (Act No. 121, H. 390, approved April 10, 1933, General Acts, 1933, p. 114).

Opinion by the Attorney General.

Dear Sir:

I have your letter of April 5, 1940, in which you request my opinion as follows:

"On March 4, 1940, I directed your attention to Section 1, House Bill 390, by Holland on page 114 of the General Acts at the Extra Session 1933 Legislature. Under the above Act I requested an opinion as to the following:

"Is an Assistant Examiner of Public Accounts entitled to the per diem provided in the above Section, who lives in one municipality and is on official business in another municipality of the same county?"

"In your opinion rendered me on March 13, 1940, you stated that my inquiry should be answered in the affirmative. Your opinion further stated that 'The language employed by the Legislature is clear and unambiguous. There is no requirement, either expressed or implied, that the examiner must be absent from the County of his residence before being entitled to the per diem allowed. Certainly, one who is in another municipality on official business is "away from home."'

"Please advise me your opinion as to the following question:

"Is an Assistant Examiner of public accounts entitled to per diem under Section 1 of the Act under discussion who is on official business in the county in which he resides and returns to his home each night?"

I am of the opinion that your inquiry should be answered in the negative.

In the opinion rendered to you under date of March 13, 1940, it was stated that the 1933 act (Act No. 121, H. 390, approved April 10, 1933, General Acts, 1933, p. 114) permitted the assistant examiners to be paid the sum of \$3.00 for traveling expenses while away from their home on official business. No attempt was made in that opinion to treat any state of facts other than that detailed in your letter, that is, that the assistant examiner was in another municipality. From this fact—that the assistant examiner was in another municipality—it was concluded, in the absence of any other circumstances, that the assistant examiner was away from his home on official business.

However, under the particular facts stated in the instant inquiry, I am of the opinion that an assistant examiner who is regularly assigned to work in a certain place but who returns to his home every night, which home is located in a different place, would not be away from his home on official business within the meaning of the 1933 act, *supra*.

Section 1 of said act provides as follows:

"The Assistant Examiners of Public Accounts shall be reimbursed their actual transportation expenses and in addition thereto shall be paid the sum of Three Dollars (\$3.00) for traveling expenses while away from their homes on official business, provided that they shall not draw any sum for expenses except when away from their homes on official business."

"When away from their homes on official business," as used in the above quoted statute, in my opinion, contemplates a situation where a person has his home in one territory or locality and is assigned to official business in another territory or locality so far distant from his home that it could not be reasonably expected that such person would return to his home each night. The fact that one does return to his home every night is indicative of the fact that he is not away from home on official business within the meaning of the above quoted section.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 24, 1940.

Hon. J. Foster King,
Sheriff, Tuscaloosa County,
Tuscaloosa, Alabama.
Elections—

A person who is a candidate for nomination or election in a primary election is disqualified, by reason of such candidacy, to serve as an election official in such election.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 8, 1940, in which you request my opinion as follows:

"In the coming Democratic primary it will be my duty together with two persons appointed by the Register to appoint election officials, using the list submitted by the local Democratic Committee. In the past members of the Democratic Committee have usually served as returning officers, and as the members of this committee are now candidates for election to the Committee, their qualifications to serve have been questioned. Will you please advise me on the following:

"1. Is a candidate for election to the County Democratic Committee who has opposition eligible to serve as a manager, clerk or returning officer?"

"2. Is a candidate for election to the County Democratic Committee without opposition eligible to serve as a manager, clerk or returning officer?

"3. Is a candidate for an office other than Members of the County Democratic Committee who does not have opposition eligible to serve as manager, clerk, or returning officer in the primary election in which he is a candidate?"

Under date of April 1, 1940, in an opinion to Hon. Claiborne Blanton, Member, Dallas County Court of County Revenues, Selma, Alabama, a copy of which is herewith enclosed for your information, I held that the only prerequisite qualification for the appointment of a person as the returning officer of a voting place was that he be a qualified elector of that voting place. In that opinion, Section 437 of the Code of Alabama, 1923, was quoted. It deals with the appointment of all election officials, and reads as follows:

"Section 437. Officers of election; how appointed.—The judge of probate, sheriff and clerk of the circuit court, or a majority of them, acting as an appointing board, must, not more than twenty nor less than fifteen days before the holding of any election in their county, appoint from the qualified electors of the respective voting places, three inspectors and two clerks for each place of voting, and returning officer for each precinct, to act at the place of holding elections in each precinct."

Thus, it can be seen that the holding of the opinion to Mr. Blanton in regard to the prerequisite qualification for a person appointed as returning officer is equally applicable to the other election officials, i. e., the inspectors or managers and clerks.

However, in that opinion the question of certain persons being disqualified from serving as election officials was not considered.

The whole tenor of the election laws of this State is against persons who are candidates for nomination or election in any election, either general or primary, having anything whatever to do with the holding or conduct of the election.

Thus, while election officials, as pointed out above, are appointed by an appointing board ordinarily composed of the judge of probate, sheriff and clerk of the circuit court, if any or all of said officers are candidates for nomination or election to any office at any election, such officers may not serve on the appointing board, and the judge of probate shall certify to the register of the circuit court the fact of the candidacy of any member of the appointing board. Section 439, Code of Alabama, 1923. Thereupon, the register of the circuit court shall forthwith and without delay appoint a qualified elector to take the place of each member of the appointing board who is a candidate for nomination or election and shall cause the elector so appointed to be informed of his appointment, **but no person shall be appointed who is a candidate for any office to be voted for in that election.** Section 440, Code of Alabama, 1923. When there is no register of the circuit court, or he is disqualified from any cause to perform his duties under Section 440, supra, the judge of probate shall certify the fact of the candidacy of any of the officers normally constituting the appointing board to the governor, who shall forthwith appoint a qualified elector to act in the place

of each of said officers who is a candidate for nomination or election. Section 441, Code of Alabama, 1923. See opinion to Hon. J. D. Sexton, Clerk, Circuit Court, Marion County, Hamilton, Alabama, under date of February 10, 1940, a copy of which is herewith enclosed for your information.

So, too, by Section 2 of Act No. 178, S. 27, approved April 19, 1933 (General Acts, 1933, p. 193) if the judge of probate is a candidate for office in any election, he is disqualified from performing his duties with reference to the handling of absentee ballots, and, in such event, all such duties must be performed by the sheriff, unless the sheriff is also a candidate, in which case the circuit judge of the circuit in which the county is located must designate a qualified elector of the county, **who is not a candidate for any office**, to perform such duties.

Also, by the provisions of Section 4 of Act No. 178, supra, as amended by Act No. 213, S. 154, approved August 8, 1939 (General Acts, 1939, p. 364) if the Chairman of the County Executive Committee of the party holding a primary election is a candidate for nomination or election to any office in the primary election, he is disqualified from performing his duties in regard to absentee ballots in such election, in which event such duties are to be performed by the secretary of said committee, or in case the secretary is also disqualified by reason of being a candidate in such primary election, the committee elects one of its members, **who is not thus disqualified**, to perform the duties required of the Chairman with reference to the handling of absentee ballots in such primary election.

It was held in an opinion to Hon. Joe M. Pelham, Jr., Circuit Judge, Washington County, Chatom, Alabama, under date of March 31, 1938, Quarterly Report of Attorney General, Vol. X, p. 193, that the Chairman of a County Democratic Executive Committee, who was running to succeed himself, was disqualified from performing his duties relative to absentee ballots in the primary election in which he was such a candidate, under Section 4 of Act No. 178, supra, as it then existed, which was not changed by Act No. 213, supra, in so far as the question of candidacy disqualifying the Chairman of the County Executive Committee from performing his duties in regard to absentee ballots in the primary election in which he is a candidate is concerned. In that opinion, it was pointed out that under the provisions of Subsection (f) of Section 60 of Act No. 56, H. 73, approved February 25, 1931 (General Acts, 1931, p. 73), generally known as the 1931 Primary Act, that the terms "county office" or "county officer" included members of the County Executive Committee of political parties.

Section 22 of the 1931 Primary Act, supra, provides as follows:

"Section 22. That if a qualified elector is unable to read or is so physically disabled that he cannot make his cross mark on a ballot, and request assistance in preparing his ballot, the inspector shall swear him as to such disability, and thereupon no more nor less than two inspectors shall assist such voter by one of them in the presence of the other inspector, marking his ballot as he directs. Each elector in preparing his ballot shall prepare the same in the room or place where such election is being held, and not elsewhere."

and Section 4 thereof reads:

"Section 4. All primary elections hereafter held by any political party in this State for the nomination of any State, National, district,

circuit, county or municipal officers, shall be held and conducted under the provisions of this Act, and except as herein modified, shall be held and conducted in the same manner and form, and under the same requirements, and subject to the same forfeitures, penalties and punishments, as are now or shall hereafter be provided by law for the holding of regular State elections, but nothing herein contained shall make it obligatory upon any political party or parties to hold a primary election."

Section 491 of the Code of Alabama, 1923, reads in pertinent part:

"Section 491. Candidate shall not act as assistant or ticket fixer.—
No candidate for election shall act as assistant to any elector in the preparation of his ballot." (Emphasis supplied)

Thus, it can be seen from the three statutory provisions last hereinabove cited, construed in *pari materia*, that a candidate for nomination or election to any office in a primary election certainly could not be appointed as an inspector or manager in such election, for the simple reason that he could not perform all of the duties required of the inspectors or managers in primary elections.

The above cited and quoted provisions of the statutory laws of this State in regard to elections, both general and primary, have been set out for the purpose of showing the legislative policy of this State to disqualify persons who are candidates for nomination or election to any office in any election, either general or primary, from having anything whatever to do with the holding or conduct of such election. Other provisions of our statutory laws concerning elections, both general and primary, could be cited. The wisdom of such a policy is apparent. In this connection, I quote as follows from the opinion by Judge Samford in the case of *Allgood v. State ex rel Wilson*, 20 Ala. App. 665, 104 So. 847:

"It is also announced by text-writers and sustained by ample authority that:

"For the purpose of determining the meaning of a statute, recourse may be had to considerations of public policy, and to the established policy of the Legislature as disclosed by a general course of legislation." 36 Cyc. 1111; *Davis & Co. v. Thomas*, 154 Ala. 279, 45 So. 897; *City of Birmingham v. So. Ex. Co.*, 164 Ala. 529, 51 So. 159."

The premises considered, it is my opinion that a person who is a candidate for nomination or election to any office in a primary election is disqualified, by reason of such candidacy, to serve as an election official in such election. It follows, therefore, that each of your specific inquiries should be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 25, 1940.

Hon. W. P. Slaughter, Chairman,
Barber Commission of Jefferson County,
Room 603, Courthouse,
Birmingham, Alabama.

Barber Commission—Jefferson County

1. Barber Commission of Jefferson County is not authorized to make rules and regulations covering the use of towels, combs, barbering implements, etc.
2. Barber Inspector has no authority to seize unclean towels, combs, barbering implements, etc.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of April 3, 1940, in which you request my opinion as follows:

"In Re: Power or authority of Barber Inspector of Jefferson County, Alabama to take unclean or unsanitary towels, cloaks, combs, barbering tools, implements, etc. from barber shops located in Jefferson County, Alabama, where health or sanitation laws, rules or regulations have been violated and to use such articles so taken in evidence in cases arising out of said violations.

"I would appreciate your informing me whether the Barber Inspector of Jefferson County, Alabama, who is employed pursuant to the provisions of the General Acts of 1931, page 615 as amended, has the authority to take or seize from barber shops in Jefferson County, Alabama unclean or unsanitary towels, cloaks, combs and barbering tools or equipment used in barber shops of this County, to introduce and use in evidence in cases arising out of the violation of health or sanitation laws, rules and regulations by shops in said County.

"I would call your attention to the fact that the Barber Commission of Jefferson County acts under a General Act of the Legislature of 1931, page 615 as last amended by General and Local Acts of 1936, page 72. Pursuant to the power and authority contained in these acts the Barber Commission has enacted certain rules and regulations pursuant to the health laws pertaining to barber shops in this State. In the enforcement of the rules and regulations so enacted and the general health and sanitation laws of the State we find it necessary in such a large County as Jefferson to institute numerous cases to enforce these laws. Where a shop flagrantly violates the state statutes or rules and regulations of the Commission enacted for health and sanitation purposes, it is necessary, in order to insure the proper presentation and prosecution of these cases to have the unclean towels, brushes, etc. to introduce in evidence. It is frequently necessary for the Barber Inspector, upon whom rests the responsibility of the prosecution, to take these implements until the date of the trial for the purpose of introducing them in evidence."

The statute in question is Act No. 508, H. 1022, which became a law July 24, 1931, under the provisions of Section 125 of the Constitution (General Acts, 1931, page 615), as last amended by Act No. 113 H. 123, approved April 14, 1936 (Gen. Acts 1936 p. 71).

I have searched the original act above cited, and the amendment thereto, but I find no provision of either the original act or of the amendment thereto, relating to the use of unclean or unsanitary towels, cloaks, combs, barbering tools, implements, etc. in barber shops. It is my opinion that the Barber Commission of Jefferson County is without authority to promulgate rules and regulations regarding the use of unclean or unsanitary towels, cloaks, combs, barbering tools, implements, etc. See opinion addressed to you under date of April 19, 1940.

You will notice that the Barber Inspector is only given authority to arrest for a violation of the provisions of the act setting up the Barber Commission. Said act provides in part as follows:

"The inspector shall have the power and authority to arrest persons guilty of a violation of any of the provisions of this act."

True, Section 1120 of the Code as amended by Act No. 444, S. 248, approved September 13, 1935, General Acts, 1935, p. 940, provides that all furniture, tools, appliances, and other equipment of a barber shop shall be kept at all times in a clean and sanitary condition. However, nowhere in the Act is the Barber Inspector authorized to arrest for a violation of the public health statutes of the State, of which the last above cited statutory provision is a part.

Therefore, as having such unclean implements does not constitute a violation of any of the provisions of the Barber Commission act, and the Barber Commission has no authority to pass rules and regulations regarding the use of such implements, the Inspector has no authority to arrest a person for the use of unclean towels, combs, barbering implements, etc., and in the absence of the Inspector's authority to arrest for such purpose, he has no authority to seize such implements.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 25, 1940.

Hon. Ben C. Morgan,
Chief, Game, Fish and Seafood Division,
Capitol.

Person, firm, corporation or association or his or its agent transporting raw oysters into State of Alabama must comply with Section 26 of Act No. 169 H. B. 183, approved March 1, 1937 (General and Local Acts of Alabama, Extra Session, 1936-1937, at page 192).

Only person, firm, corporation or association or his or its agent selling or offering for sale seed oysters or shrimp within the State, liable for license imposed by Section 26½ of Act No. 169, supra.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion as follows:

"In Re: Non-Resident Transport License, Section 26½ McDermott, Oyster Dealer's License, Section 26, McDermott.

"Attached find letter which is self-explanatory.

"Please give me your opinion on this matter. Return this letter with your opinion for our files."

"In re: State License—Johnson Fish Company, Atlanta Sea Food Company, Inc., Capitol Fish Company, all of Atlanta, Georgia.

"The above three companies are wholesale fish dealers with the main and only business located in the City of Atlanta, Georgia, who employ salesmen to solicit orders for their products from retailers and wholesalers in the State of Alabama. These orders are written up by the salesmen and forwarded back to the companies in Georgia. The companies then ship those orders by truck upon a bill of lading consigned direct to the customer in Alabama. No orders are solicited or secured by any of the truck drivers nor any of their products sold to the customer from the truck.

"Under this statement of facts, the same is outlined to your Attorney General's office, we contend that the three companies are engaged in interstate commerce and in view of this, the State of Alabama cannot legally enforce a license tax.

"According to your correspondence in the above matter, your interpretation of Section 26½ of the Act does not coincide with our contentions in that neither of the above companies transport for commercial purposes any oysters or raw shrimp beyond the boundaries of Alabama, but on the contrary the companies transport fish into the State of Alabama. Neither do they sell or offer for sale seed oysters or shrimp within the State of Alabama.

"In regard to your interpretation of Section 26 of the Act, we contend that it is ineffective insofar as the above companies are concerned in that said license is a burden on interstate commerce and therefore cannot be legally enforced.

"I would appreciate it and respectfully ask that for his opinion in the matter in order that we may bring about a satisfactory settlement without unnecessary litigation.

"Due to the fact that your Deputy in Opelika has made a case out against the above three companies requiring them to post bond, which bonds are now pending, I will appreciate that you give this matter your immediate attention in order that the same may be satisfactorily cleared up to all parties concerned."

Under date of April 3, 1940, you advise as follows:

"Regarding the request by this Department for an opinion on non-residents transporting and selling in the State of Alabama oysters and shrimp, most particularly regarding the cases of the Johnson Fish Company, the Petrey Fish Company, and the Capitol Fish Company of Atlanta, Georgia, the Johnson Fish Company truck was stopped and the driver put under bond for transporting into Lee County raw oysters put up in one-gallon cans, packed six to a box. The Petrey Fish Company truck was intercepted and the driver put under bond for selling oysters put up in one-gallon cans, packed six to a box, making deliveries in Opelika and Auburn. The Capitol Fish Company truck was intercepted in the same county by the same warden for transporting and selling oysters packed in one-gallon cans, packed six to a box.

"In other words, all three of these company's drivers were intercepted for transporting and selling or offering for sale, raw oysters packed in one-gallon cans. They did not have a license to transport or sell in the State of Alabama out of State oysters and shrimp. They also had on these trucks, all three of them, salt water fish in addition to the oysters, and nothing was done or mentioned about the fish, as we do not have any laws or regulations governing same. If any of these people or all of them contend that they only had fish, each and every one separately made false statements and the cases were made on oysters and nothing else."

It is my opinion that the companies mentioned in your letter are subject to the license provided for in Section 26 of Act No. 169, H. B. 183, approved March 1, 1937 (General and Local Acts of Alabama, Extra Session, 1936-1937, at page 192) which is as follows:

"Section 26. Before any person, firm, corporation or association shall engage in transporting or hauling by means of any motor truck or other motor driven vehicle raw oysters or raw shrimp for commercial purposes, he or it shall make application to the Alabama Oyster Commission accompanied by a fee of Five (\$5.00) Dollars, and upon approval of such application said Commission shall issue to said applicant a license to engage in the business for which the application is made. Such license shall be dated and shall be effective only for the season issued."

In 11 Am. Jur. Section 99, at page 89, the following statement is found:

"Inasmuch as the title thereto is vested in the people of the state in their sovereign capacity, the states have greater control over fish and game than over commodities which are the subjects of private ownership. Generally speaking the states have the power to dictate the circumstances in which fish and game shall be taken and may make regulations which are applicable to fish and game coming from other states. It is generally held that statutes or regulations regarding the possession, transportation, or sale within the state of fish or game taken outside of

the state are a valid exercise of the police power and not unconstitutional as an interference with foreign or interstate commerce."

Section 66 at page 386, in 15 C. J. S. in part is as follows:

"However, in view of a valid federal statute which, by prohibiting the shipment or transportation in interstate commerce of game killed in violation of state laws, and by providing that foreign game, when transported into any state, shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced within such state, has eliminated all questions of interstate commerce and given the states entire freedom to prohibit the importation of game into, or the exportation out of, its own territory, as well as power to prohibit the possession or sale of imported game, and in view of the further considerations that the ownership of fish and game, as well as navigable waters and their contents is in the state in its sovereign capacity in trust for the common benefit of the people of the state, that the state has police powers in reference thereto, that game can never be the object of commerce except with the consent of the state and subject to such conditions as it may deem best to impose for the common good, * * *."

See also:

92 A. L. R. 1267;

People v. Booth Fisheries Co., 97 N. E. 837;

Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371;

State v. Harrub, 95 Ala. 176, 10 So. 752;

15 L. R. A. 761, 36 Am. St. Rep. 195.

It will be seen from a reading of the above authorities that a State has an inherent right to regulate and protect its natural resources and that statutes or regulations regarding the possession, transportation, or sale within the state of fish or game taken outside of the state are a valid exercise of the police power and not unconstitutional as an interference with foreign or interstate commerce. It therefore follows that inasmuch as a State has power to regulate the particular subject matter here being considered then it certainly has the power to levy an inspection tax to carry out that purpose. **Gulf Fisheries Co. v. Darranzet**, 17 F. (2d) 374, affirmed in **Gulf Fisheries Co. v. MacInerney**, 276 U. S. 124. The power of inspection and investigation over oysters and shrimp is given in Section 31 of Act No. 169, supra, and under the authority of **Gulf Fisheries Co. v. Darranzet**, supra. we have a right to find that the tax levied in Section 26, supra, is properly laid as an inspection tax and this inspection fee is prima facie deemed to be reasonable. **Pure Oil Co. v. State of Minnesota**, 39 S. Ct. 35, 248 U. S. 158, 63 L. Ed. 180, affirming 158 N. W. 723, 134 Minn. 101.

In my judgment the companies hereinabove mentioned are not liable for the license provided for in Section 26½ of Act No. 169, supra, as the facts set forth in your letter of April 3, 1940, clearly show that the above mentioned companies did not bring into the State seed oysters. Section 26½ of Act No. 169, supra, imposes a license only upon any person, firm, corporation or as-

sociation or his or its agent for selling or offering for sale seed oysters or shrimp within the State.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 25, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Alabama Beverage Control Act—

1. Section 41½, Subsection (c), is mandatory in requiring at least a quarterly examination of taxpayers' records.

2. Examination of taxpayers' records provided for by Section 41½, Subsection (c) may be made by either an employee of the Alabama Alcoholic Beverage Control Board or by a designated Assistant Examiner of Public Accounts, subject to the control of the Board.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 1, 1940, in which you request my opinion as follows:

"Please give me your answer to the following questions:

"1. Under Section 41½, Sub-section (c), of the Alabama Beverage Control Act, is the provision dealing with the examination of taxpayers' records mandatory in its meaning and intent?

"2. If an affirmative reply is given to the first question, upon whom is the responsibility for such examinations placed, Examiners of Public Accounts assigned to the A. B. C. Board, or employees of the Board?

"3. If it is the duty of the Board to have these examinations made by one of its employees, could not the Board delegate the work to an Examiner of Public Accounts?"

In considering your first inquiry, i. e., in determining the character of the provision—whether mandatory or permissive—of Section 41½, Subsection (c), of the Alabama Beverage Control Act (Act No. 66, H. 44, passed by

the House and Senate on February 2, 1927, notwithstanding veto, under Sec-125 of the Constitution (General Acts, 1936-37, p. 40)),—it must be understood that there is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act, in relation to the subject of legislation and the general object intended to be accomplished. **Alabama Pine Co. v. Merchants & Farmers Bank of Aliceville**, 215 Ala. 66, 109 So. 358; 59 C. J. 1072, Section 631.

Section 41½, Subsection (c), provides as follows:

“(c) Any person, firm corporation or association of persons who desire to use tax-paid crowns or lids and having been qualified by the Board to use said tax-paid crowns or lids, as provided in this Section shall be required to pay the cost of the examination of their records by examiners of the board to determine the amount of taxes due and paid to the State by said person, firm, or corporation, said examination to be made at least quarterly by the examiners of the Board.”

My view of the provision in Subsection (c) of Section 41½, requiring “said examination to be made at least quarterly by the examiners of the Board” is that it is mandatory and not directory merely. Section 41½ was inserted into the act to permit the Alabama Alcoholic Beverage Control Board to qualify certain persons, firms, corporations, associations, etc. desiring to use tax-paid crowns or lids to use such lids by purchasing them from approved manufacturers. Obviously, the most reasonable check which could be had upon the users of such tax-paid crowns or lids was by examination of their books and records. The Legislature, in an effort to make certain that the examinations of the records would be had, affirmatively set forth in Subsection (c) of Section 41½ a provision requiring “said examination to be made at least quarterly by the examiners of the Board.” When the Legislature said “at least quarterly”, I understand them to mean that the examination was to be made not less often than four times each year. The words “at least” have been repeatedly interpreted to mean “not less than.” **Hoffman v. Clarke County**, 20 N. W. 376; **Polk v. Lane**, 12 Tenn. 36; **Miller v. State**, 94 So. 706 (Miss.) Of course, discretion was left in the Board to determine whether the examination should be made more often than quarterly.

Replying to your inquiries concerning the responsibility for such examinations and by whom the same should be made, I again call your attention to the language of Subsection (c), supra, which provides that the examinations are to be made “by the examiners of the Board.” It seems quite clear that full and complete responsibility for the examination is placed upon the Alabama Alcoholic Beverage Control Board. The Board and the administrator, appointed by the Board under provisions of Section 5 of the Act, are given authority to appoint all persons necessary to properly enforce the provisions of the Act (See Sections 5 and 53). It, therefore, appears that an examiner of the Board might be either an employee of the Board or any person designated by the Board to do the particular work assigned. In my judgment, the Board may authorize an assistant examiner of accounts to make such examinations, provided, however, that such an examiner would necessarily be under full and complete control of the Board at all times for Subsection (c) clearly states that the examination must be by “examiners of the Board”

and this language to my mind carries the implication of control by the Board.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

April 25, 1940.

Hon. R. E. King,
Tax Collector,
Mobile County,
Mobile, Alabama.

~~Taxation—Exemptions—~~

Lands of Aluminum Ore Company held not exempt from taxation under Section 4 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 11, 1940, in which you request my opinion as follows:

"Please refer to the attached letter from Mr. McCorvey, in which he has asked for an exemption for the Oluminum Ore Co., basing his request on Section 4, page 262, of the General Acts of 1935, and give me an opinion as to whether or not this Company is entitled to this exemption.

"The facts in the case are as follows:

"The plants or buildings of this Company are located on the State Docks lands which automatically gives them full exemptions for a certain number of years. This Company purchased a number of lots across the river from the parent plant, and which is used for a dumping ground for the ore or refuse after the ore has gone through the furnaces, and as yet has no other improvements on them. The only way these lots are connected to the lands of the parent Company is by a pipe line through which the refuse is carried under the river and dumped."

In answer to your inquiry, it is my opinion that the lands in question used for a dumping ground are not exempt from taxation.

Section 4 of the Revenue Act of 1935 provides as follows:

"Section 4. All real and personal property, except lands upon which located, of factories or plants, manufacturing calcium cyanamid (lime nitrogen), aluminum, or aluminum products shall be exempt from state, county and municipal taxation for ten (10) years after the beginning of the construction of such plant or factory."

The language of the above quoted section is ambiguous and the meaning is doubtful. Therefore, we must ascertain the legislative intent to determine its true meaning. In ascertaining this legislative intent, we must look to the context, spirit or to the meaning rather than to the strict letter thereof. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529, 51 So. 159.

In an opinion of this office rendered to the Commissioner of Revenue on January 26, 1940 (Quarterly Report of Attorney General in reference to said section:

"In this connection, it might be well to point out that the lands upon which the real and personal property of the factories or plants are located are not exempt from ad valorem taxation, indicating, I think, an intention on the part of the Legislature to confine the exemption of real and personal property of such factories or plants to the real and personal property located upon the lands of such factories or plants.

"It is a well-established rule in this State that statutes creating exemptions from taxation must be strictly construed in favor of the taxing power against the person claiming the exemption; that exemptions allowed by such statutes must not be enlarged by construction; and that exemption claims not clearly within the import of such statutes must be rejected. See cases collated in 18 Alabama Digest 312, Taxation, Key No. 204(2)."

It will be noted that said opinion stated it was the intention of the Legislature to confine the exemption of real and personal property of such factories or plants to the real and personal property located upon the lands of such factories and plants. It, therefore, follows that the lands, no matter where located, are not exempt. This, in my judgment, is a correct interpretation of the statute under consideration. It would be an unreasonable construction of said statute to hold that the Legislature intended to tax the lands upon which the factory or plant was located and exempt other lands of said factory or plant which might be located some distance therefrom or even in another county.

Statutes should receive a sensible construction, such as will effect the legislative intent, and, if possible, so as to avoid an unjust or absurd conclusion. **Abramson v. Hard**, 229 Ala. 2, 155 So. 590. Courts must give the language used in a statute reasonable rather than unreasonable meaning. **Erwin v. State of Alabama**, 80 Fed. (2nd) 423. Moreover, as above pointed out, exemptions from taxation must be construed strictly in favor of the taxing power.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 27, 1940.

Hon. Wiliam A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Circuit Clerk—Sections 1406, 2683, 2690, 6724, 6728, 10127 and 10128 of the Code of Alabama, 1928.

Clerks of the Circuit Court have no authority to turn over official books, records, documents, original papers to State Department of Archives and History.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of April 12, 1940, in which you request my opinion as follows:

"Because of the large number of official books, records, documents, and original papers not in current use in the office of the Clerk of the Circuit Court of Mobile County, Alabama, and further because of the limited storage space in the Mobile County Court House I am desirous of availing myself of Section 1406 of the Code of Alabama of 1923.

"In the event I turn over the the Department of Archives and History for permanent preservation the official books, records, documents, and original papers not in current use in the office of the Clerk of the Circuit Court of Mobile County, Alabama, I request your opinion on the following questions:

"1. Have I under said section the legal authority to turn over to the Department of Archives and History of the State of Alabama said official books, records, documents and original papers?

"2. If you rule that I have such authority would I be relieved of all responsibility for the preservation of same?

"3. If you rule I have such authority would the County of Mobile or myself be responsible for the expense necessary to the removal or transportation of said official books, records, documents and original papers?"

The particular section you refer to reads as follows:

"Section 1406. Authority of officials.—Any state, county, or other official may, in his discretion, turn over to the department for permanent preservation therein any official books, records, documents, original papers, newspaper files, and printed books not in current use in their offices."

Your attention is called to subsections 9, 10, 11, 12, 14, 17 of Section 6724 of the Code of 1923, pertaining to circuit clerks, which read as follows:

"9. To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 10129 (5736), except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

"10. To enter on the fee book, execution docket, and on the execution, the name of the attorney for the plaintiff in the judgment."

"11. **To keep and file the books and dockets and papers in relation to, and the records of all suits which have been determined in the county court and, deposited with them,** as they are required to keep and file the books, dockets, papers, and records of suits in the circuit court; and to issue all writs of execution, scire facias, writs of error, or other process on the judgments of such court, returnable as if such suits had been determined in the circuit court." (Emphasis supplied)

"12. **To keep all the papers, books, dockets and records belonging to their office, with care and security;** the papers filed, arranged, numbered and labeled, so as to be of easy reference; and the books, dockets and records, properly lettered; and to allow parties to inspect the records free of charge." (Emphasis supplied)

"14. **To make out and deliver,** on application and payment of the legal fees therefor, to any person applying for the same, a correct transcript, properly certified, of any paper or record in their offices." (Emphasis supplied)

"17. **To keep direct and reverse indexes** of all record books in their offices, **which must always be in good and substantial,** well-bound books; but they are not required to prepare any new indexes when those already in the office are sufficient." (Emphasis supplied)

Section 6727 of the Code of 1923 provides:

"Section 6727. Records open to examination.—The records of the clerk's office, except as otherwise provided, must be free for the examination of all persons when not in use by him."

Section 6728 of the Code of 1923 provides:

"Section 6728. Recopy of books in his office.—The clerk, deeming it necessary to recopy any books in his office, **in order to secure their contents from damage or loss,** must submit the same to the examination of the court of county commissioners, who, if they deem such recopy necessary, must, upon the minutes of the court, order the same to be made; and the clerk must make the same in good and substantial books; and such court must allow him a reasonable compensation therefor." (Emphasis supplied)

Sections 2683, 2690, 10172 and 10128 of the Code of 1923 provide, respectively, as follows:

"2683. Property and papers delivered to successor.—In all cases in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property, and money belonging or appertaining to such office must, on demand, be delivered over to his qualified successor."

"2690. Public officers shall keep complete books, papers, etc.—All public officers and servants shall correctly make and accurately keep in and for their respective offices, or places of business all such books, or sets of books, documents, files, papers, letters and copies of letters, as at all times to afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant, and from which the actual status and condition of such activities and business can be ascertained without extraneous information; and all of the books, documents, files, papers, letters, and copies of letters so made and kept shall be carefully protected and safely preserved, and guarded from mutilation, loss or destruction."

"10127. No records or papers removed from county.—**No records or papers of any court must be removed out of the county**, except in cases of invasion or insurrection, whereby the same may be endangered, or unless by order of the court." (Emphasis supplied)

"10128. Records of abolished courts.—The records of the judgments of any inferior court of record, which heretofore ceased or hereafter ceases to exist, is confided to the clerk of the circuit court of the county in which such court held its sessions; and **such clerk shall preserve said records as a part of the records of his office**, and he must issue any and all necessary processes for putting such judgments into execution." (Emphasis supplied)

Funds or properties of the State coming into the hands of a public officer by virtue of his office ipso facto constitute such officer a trustee for the State. *Ex parte Cowart*, 201 Ala. 55, 77 So. 349.

The clerk is the legal custodian of the records in his office and while not liable as an insurer, he is bound to exercise a high degree of diligence in their preservation and safekeeping. 11 Corpus Juris 887, 14 Corpus Juris Secumдум 1246.

From a careful reading of the above quoted sections of the Code, I am of the opinion that the official books, records, documents, and papers in the office of the Circuit Clerk are in current use at all times and therefore you have no legal authority under Section 1406 of the Code, *supra*, to turn over such official books, records, documents, and original papers to the Department of Archives and History of the State of Alabama. Having ruled that you have no such authority, it is unnecessary to answer your inquiries numbered two and three as they presuppose an affirmative reply to your first inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 30, 1940.

Hon. Rascoe Maddox, Superintendent,
Chilton County Board of Education,
Clanton, Alabama.

Schools—County Board of Education—

County board of education has authority to pay for the erection of lights on a football field of a public school in furtherance of that school's physical education program.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of April 4, 1940, in which you request my opinion as follows:

"The Board of Education of Chilton County is considering the installation of lights for the football field of Chilton County High School. Will you kindly advise if it will be legal for the County Board of Education to pay for the installation of these lights from the county school funds?"

It is my opinion that your inquiry should be answered in the affirmative.

As has been pointed out in an opinion to Hon. Geo. W. Andrews, under date of October 6, 1936, Quarterly Report of Attorney General, Vol. V, page 5, physical education of students in the public schools of Alabama is a recognized and required part of their curriculum. The erection of lights for the football field is a promulgation of this phase of the educational curriculum.

In an opinion to Hon. J. A. Keller, under date of June 15, 1937, Quarterly Report of Attorney General, Vol. VII, page 218, it was held that obligations incurred by the county board of education for athletic equipment may be paid from the general school funds.

In other words, if the equipment purchased is in furtherance of an approved course of study, the expenditures therefor are properly made from the general school funds.

Quarterly Report of Attorney General, Vol. VI, page 85;

Quarterly Report of Attorney General, Vol. VIII, page 320;

Quarterly Report of Attorney General, Vol. VII, page 218.

Furthermore, in a recent opinion to Hon. W. W. Malone, under date of April 17, 1940, a copy of which is enclosed for your convenience, it was held that the construction of an athletic stadium was a proper expenditure (see the numerous opinions cited therein).

The premises considered, it is my opinion that the erection of lights on a football field in furtherance of the physical education program of a public school is a proper expenditure by the county board of education.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 1, 1940.

Hon. John D. Chichester, Chairman,
Alabama Real Estate Commission,
Jackson Building,
Birmingham, Alabama.

Alabama Real Estate Commission—

Persons acting as leasing agents for oil companies in the procuring of oil leases held subject to the provisions of the General Acts of 1927, page 336, as amended, requiring licenses from the Alabama Real Estate Commission, as real estate salesmen or real estate brokers.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 20, 1940, in which you request my opinion as follows:

"Your opinion is requested on the following statement of facts:

"Are the following persons, under the given circumstances, liable for a license provided for by the General Acts of 1927—Page 336, as amended by the General Acts of 1931?

"Certain oil companies, or agents of oil companies, are purchasing leases on lands through agents or persons in the county, who are not licensed by the Alabama Real Estate Commission. Are these persons who act as agents for oil companies, or purchasers in the procuring of the above named leases, subject to license as provided for by the General Acts of 1927, page 336?"

In reply, I wish to advise that in my opinion the persons named by you under your statement of facts are subject to the provisions of the named General Act of 1927, page 336, as amended. The pertinent provisions of Act No. 344, H. 377, approved August 27, 1927 (General Acts, 1927, page 335), Section 2, provide in part, as follows:

"Section II. A real estate broken within the meaning of this Act is any person, firm, partnership, co-partnership, association or corporation, who, for a compensation or valuable consideration, sells or offers for sale, buys or offers to buy, negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation. The term 'real estate' as used in this Act shall include leaseholds and other interests less than leaseholds. A real estate salesman within the meaning of this Act is any person who, for a compensation or valuable consideration, is employed either directly or indirectly by a real estate broker to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation. One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, or leasing, or renting, or offering to rent real estate, except as herein specifically excepted, shall constitute the person, firm, partnership, co-partnership, association or corporation, performing, offering, or attempting to perform any of the acts enumerated herein, a real estate salesman within the meaning of this Act. * * *"

You will note that any person acting as the agent of another, who, for a compensation or valuable consideration arising from the transaction which is performed either as a whole or partial vocation, in the selling, buying, exchange or rental of real estate, or the offer to sell, buy or to negotiate the purchase or sale or exchange of real estate, or to lease or rent any real property or any interest therein, as set out above, is a real estate broker or salesman as defined by the quoted act of the Legislature.

In my opinion, a single transaction concerning any interest in real property which may be the subject of sale, rental or exchange, is sufficient to support a requirement for qualification of said agent so selling, buying, renting or transacting the exchange of property, as above stated, for the license provided by the above named act of 1927. In my judgment, a lease of lands for the purpose of promoting prospective oil drilling, made as heretofore set out, is clearly within the provisions of the above named statute.

I wish to further call your attention to the provision of the above named act as follows:

"One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, or leasing, or renting, or offering to rent real estate, except as herein specifically excepted, shall constitute the person, firm, partnership, co-partnership, association or corporation performing, offering, or attempting to perform any of the acts enumerated herein, a real estate broker or a real estate salesman within the meaning of this Act." (Emphasis supplied)

Premises considered, it is my opinion that only one act for a valuable consideration or compensation performed for another is sufficient to render necessary the qualifying with the Alabama Real Estate Commission of the person so engaged.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1940.

Hon. F. T. Hodges,
Tax Assessor, Henry County,
Abbeville, Alabama.

Homestead Exemptions—Tax Equalization—

Claim for homestead exemption need not be re-asserted upon change of the assessed value of property by Board of Equalization.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 8, 1940, in which you request my opinion as follows:

"I would like for you to give an opinion on the following questions as soon as possible:

"1. John Doe assessed his tax in November 1939 for 1940 and claimed his Homestead Exemption. The value of his Homestead being \$1,000.00 and the Equalization Board of their session in March raised the value to \$1,500.00. Mr. Doe does not object to the raise. Will he have to come before the Assessor and file another claim in order to get the benefit of the additional \$500.00 raise on his 1940 taxes?

"2. If he does have to file again to get the additional raise, when?

"3. If he doesn't have to file this year will he this fall when he assesses again?

"The description of this property hasn't changed since Mr. Doe assessed.

"4. John Smith assessed his property in December 1939 for 1940 taxes and claimed his Homestead Exemption which was valued at \$1,500.00 and the Equalization Board lowered his value to \$1,000.00. Would he have to file a new claim? When?

"The description of this property hasn't changed since Mr. Smith assessed."

In reply to your questions numbered one and four, it is my opinion that the taxpayer is not required to file a new claim for homestead exemption. When the claim for homestead exemption is made in its original form, it is made for the "homestead" as defined by law. The definition of a homestead, as contemplated by the acts of the Legislature exempting homesteads from taxation, is found in Act No. 107, S. 5, approved February 20, 1937 (General Acts, 1936-37, page 113), as follows:

"Section 1. The word 'homestead' as herein used is the 'homestead' as now defined by the Constitution and Laws of the State of Alabama.

"Section 2. Homesteads, as herein defined, are hereby exempted from all State ad valorem taxes beginning October 1, 1937.

"Section 3. In no case shall the exemption herein made apply to more than one person, head of the family, nor shall said exemption exceed Two Thousand Dollars (\$2,000.00) in assessed value, nor one hundred sixty (160) acres in area."

It is my opinion that a claim for homestead exemption is a claim extending in assessed value to, and not to exceed, \$2,000.00, and in area not exceeding 160 acres.

It is my opinion that the adjustment of valuation by the Board of Equalization cannot affect the granting of the homestead exemption when the same has been claimed in accordance with the provisions of law.

The necessity of an answer to your second question is removed by my answer to your first question.

In reply to your third question, I wish to advise that it is my opinion that the taxpayer must apply for the homestead exemption each year when the assessment of the property for taxes is made. I wish to refer you to an opinion of the Attorney General addressed to Hon. Madison L. Smith, Tax Assessor, Washington County, Chatom, Alabama, under date of October 5, 1937, reported in Biennial Report of the Attorney General, 1936-38, page 424, which holds that the exemption for homesteads is not granted in the absence of application therefor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1940.

Hon. Wm. W. Hill,
Probate Judge,
Montgomery County,
Montgomery, Alabama.

Time—Elections—Probate Offices—

Whenever the statutes of the State of Alabama provide that an act must be performed at a certain time of the day, such time is to be measured by Standard Railroad Central Time (Central Standard Time), as provided by Section 13 of the Code of Alabama, 1923, and not by Daylight Saving Time.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated April 30, 1940, follows:

"I notice in the morning's paper that the Governor has declared, or will declare Daylight Savings Time. Then the question arises as to the coming Primary Election. Will Daylight Savings Time prevail or will Central Standard Time prevail—for instance, Section 448 provides that the inspectors, clerk and officers appointed to hold the election shall meet at eight o'clock on the morning of the election and before nine o'clock open the polling place. Section 449 provides, among other things, on the failure of any inspector or returning officer to attend at the hour of eight, such inspector and returning officers as are present may complete the number. If none of the inspectors are present, then the returning officer shall appoint three inspectors to act, who in every instance shall be qualified electors. Would that mean eight o'clock by Daylight Savings Time or eight o'clock Central Standard Time?

"Again, Section 9577 provides that the Probate Judge must keep his office open for transaction of business, with certain exceptions, from none o'clock A. M., to four o'clock P. M. Should he keep them open according to Standard Time or Daylight Savings time? Likewise, I call your attention to Section 6878, et seq. Does it mean Central Standard Time or Daylight Savings Time? There are many other sections too numerous to mention, but the same principle applies to them all.

"I recall that during the World War they had Daylight Savings Time, but by what authority, I do not know."

It is my opinion that whenever the statutes of the State of Alabama prescribe that a certain act must be performed at a certain time of the day, the provisions of Section 13 of the Code of Alabama, 1923, must be followed.

The pertinent part of Section 13 reads as follows:

"13. * * * In designating the hours of the day, the time used shall be that of the ninetieth degree of longitude west of Greenwich, otherwise known as 'Standard Railroad Central Time.'"

I now proceed to answer the question propounded in your letter of inquiry as to whether or not the proclamation of the Governor, under date of April 29, 1940, and effective at two o'clock A. M., May 5, 1940, proclaiming Daylight Saving Time for the State of Alabama, will have the effect of superseding or nullifying the quoted provisions of Section 13, supra.

Section 61 of the Constitution of Alabama, 1901, reads as follows:

"61. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose."

In considering the constitutional provision above, the Supreme Court, in the case of **Hall v. Blan**, 227 Ala. 64, 148 So. 601, held that a resolution of the Legislature which purported to change the provisions of a theretofore validly enacted statute was unconstitutional as violative of this section. On the basis of that authority, it is my opinion that a proclamation of the Governor which conflicts with a provision of the statutory law of this State, instantly Section 13, supra, is ineffectual to change that provision of our statutory law.

To my mind, the decision in the case of **Ellard v. Goodall**, 203 Ala. 476, 83 So. 568, is conclusive of the fact that whenever a statute of the State of Alabama prescribe: that an act must be done at a certain time of day, it has reference to Standard Railroad Central Time (Central Standard Time), as provided by Section 13, supra. In that case, the question was whether or not the time within which a particular act should be done should be measured by Central Standard Time, as provided by statute of the State of Alabama, or by "National Legal Saving Time" (Daylight Saving Time), provided by an Act of Congress, U. S. Stat. at Large, Vol. 40, pp. 450, 451 (U. S. Comp. Statutes, 1918; U. S. Comp. Statutes, Annotated Supplement, 1919, Sections 8907(r), 8907(u)). The Supreme Court of Alabama held that the time within which the act should be done was to be measured by Central Standard Time.

Section 448 and Section 486 of the Code of Alabama, 1923, dealing with general elections held in the State of Alabama, read, respectively, as follows:

"448. Time and place of holding elections.—The inspectors, clerks and returning officers appointed shall meet at the place of holding elections in the several precincts for which they have been appointed, by 8 o'clock of the morning of election, and before 9 o'clock open the several polling places as designated."

"486. Polls; how long open.—The polls must be opened at each place of voting, in each precinct, between the hours of eight and nine o'clock in the morning and kept open without intermission or adjournment until the hour of five in the afternoon, and no longer; provided, that in cities and towns of over five thousand inhabitants the polls shall remain open until six o'clock in the evening, and no longer."

Section 4 of Act No. 56, H. 73, approved February 25, 1931 (General Acts, 1931, page 73), generally known as the 1931 Primary Act, provides:

"Section 4. All primary elections hereafter held by any political party in this State for the nomination of any State, National, district, circuit, county or municipal officers, shall be held and conducted under the provisions of this Act, and, except, as herein modified, shall be held and conducted in the same manner and form, and under the same requirements, and subject to the same forfeitures, penalties and punishments, as are now or shall hereafter be provided by law for the holding of regular State elections, but nothing herein contained shall make it obligatory upon any political party or parties to hold a primary election." (Emphasis supplied)

Consequently, the provisions of Sections 448 and 486, supra, apply equally as well to Primary Elections as to General Elections.

You are therefore advised that in my opinion the polls are to be opened and closed in the forthcoming Democratic Primary Election, to be held on May 7th, at the time provided by the above quoted sections, as measured by Central Standard Time, pursuant to Section 13, supra, and not by Daylight Saving Time.

As stated at the outset, whenever any statute of the State of Alabama prescribes a particular time of day for the performance of any act, the time of day so specified must be measured by Central Standard Time, and not by Daylight Saving Time.

This legal proposition applies to the time during which the probate office shall be kept open for the transaction of business, as provided by Section 9577 of the Code of 1923, as well as to the other matters mentioned in your request.

The above is not to be construed as affecting the applicability of Daylight Saving Time to the performance of any acts other than those which a statute of the State of Alabama prescribes must be performed at a particular time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 3, 1940.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

Elections — Absentee ballots—

A qualified elector who has forwarded an absentee ballot to the proper authority may not subsequently recall or withdraw the same in any event or for any reason.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of May 3, 1940, in which you request my opinion as follows:

"In connection with the forthcoming Democratic Primary, to be held on May 7, please advise me on the following questions in regard to the withdrawal of absentee ballots after such ballots have been forwarded by the elector to the Chairman of the County Democratic Executive Committee.

"(1) May a voter withdraw his absentee ballot after same has been delivered to the Chairman of the Democratic Executive Committee?

"(2) May a voter withdraw his absentee ballot after such ballot has been delivered by the Chairman of the Democratic Executive Committee to the officials of the absentee ballot box?"

In my opinion, a qualified elector who has forwarded an absentee ballot to the proper authority may not subsequently recall or withdraw the same in any event or for any reason.

Absentee voting in primary elections is governed by the provisions of Sections 677-684, inclusive of the Code of Alabama, 1923, as modified by Act No. 178, S. 27, approved April 19, 1933 (General Acts, 1933, p. 193) as Section 4 thereof was amended by Act No. 213, S. 154, approved August 8, 1939 (General Acts, 1939, p. 364).

So far as intensive research discloses, there are no positive statutory provisions, either specifically authorizing a qualified elector who has forwarded an absentee ballot to the proper authority subsequently to recall or withdraw the same in any event or for any reason, or specifically prohibiting such a person from so doing. However, Section 678 of the Code of Alabama, 1923, as modified by Section 6 of Act No. 178, supra, provides in pertinent part as follows:

" * * * The chairman of the county executive committee, or other authority as provided, shall endorse on said envelope (the envelope which contains the absentee ballot) over his signature, the date and hour of the receipt thereof by him, **and shall safely keep the said ballot without breaking the seal thereof, and * * * on the date of any * * * election, as soon as the polls are open, * * * the chairman of the political party holding the primary, or person acting in his stead in the case of primaries * * * shall deliver all absentee ballots received to the election officers appointed under Section 5 of this act (the election officials of the absentee ballot box).**" (Emphasis supplied)

Section 7 of Act No. 178, supra, reads as follows:

"Section 7. Any Judge of Probate, Chairman of the Executive Committee of a political party, Mayor or other chief executive officer of a municipality, or any person acting in his or their stead, as herein provided, who shall deliver or cause to be delivered an absentee ballot to any absentee voter without first receiving a written application therefor signed by the voter, **or any person other than the duly authorized election officers who shall open an envelope knowing it to contain an absentee ballot shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than \$50.00, nor more than \$500.00.**" (Emphasis supplied)

In my opinion, the above quoted statutory provisions impose a duty upon the chairman of the county executive committee of the political party holding the primary, or the persons acting in his stead, to whom absentee ballots are returned in primary elections, to safely keep **all** the absentee ballots which are returned to him, and to deliver the same on the day of the primary election, as soon as the polls are open, **to the election officials of the absentee ballot box**, and to no one else. To my mind, it is very significant that the Legislature provided that **all** absentee ballots received by the chairman of the

county executive committee of the political party holding the primary, or the person acting in his stead, **should be delivered to the election officials of the absentee ballot box.** It is to be noted that the emphasized portion of Section 7, *supra*, makes it a criminal offense for any person other than the authorized election officials to open an envelope knowing it to contain an absentee ballot, and subjects any person so doing to a penalty of a fine of not less than \$50.00 nor more than \$500.00. This penal provision, in my opinion, applies to the absentee voter, himself, as well as to all other persons but the authorized election officials.

It might be argued that a qualified elector who is actually present in the county of his residence on the day of the election, and who has forwarded an absentee ballot to the proper authority, would be casting an illegal ballot, if such absentee ballot was delivered by the authority to whom the same was returned to the election officials of the absentee ballot box, and the same was counted by them. This contention, in my opinion, is refuted by the case of **Wood v. State ex rel Lee**, 126 S. W. (2d) 4 (Tex.), which case involved a construction of the absentee voting statutes of the State of Texas, which statutes, in all material respects, are very similar to our statutes which provide for absentee voting in the State of Alabama. In that case it was held that if a person bona fide applied for, received and deposited an absentee ballot with the proper election officials, and circumstances later developed whereby he was present in the county of his residence on election day, nevertheless, such absentee ballot should be counted as a legal ballot, the court concluding that to hold otherwise would render the absentee voting statutes of that state unworkable.

An opinion of this office rendered to Hon. Henry N. Hughes, Chairman, County Democratic Executive Committee, Montgomery County, Montgomery, Alabama, without date, appearing in Office Edition, Vol. 1, for the period from January 4, 1926, to September 30, 1926, at page 350, is in conflict with the conclusion hereinabove reached, and it is hereby expressly overruled. In my opinion, nothing in any of the other opinions rendered by this office on the general subject of absentee voting militates against the conclusion herein reached or is in conflict therewith.

The conclusion hereinabove reached renders an answer to your specific inquiries unnecessary.

While the above opinion deals only with an absentee ballot cast in a primary election, since that is the question instantly before me, yet the conclusion herein reached would be equally applicable to absentee voting in all other elections, that the provisions of our statutory law in regard to absentee voting in all other elections being strikingly similar in language and identical in legal effect, insofar as this question is concerned, with statutory provisions in regard to absentee voting in primary elections.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 4, 1940.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Elections — Corrupt Practices—

1. Pre-election expense account of candidate in Democratic expense account of candidate in Democratic Primary held on first Tuesday in May must be filed on or before midnight Thursday preceding the election.

2. Name of candidate failing to file pre-election expense account within such time should not be placed on ballot, and, if ballots are already printed, such candidate's name should be stricken therefrom by Judge of Probate.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 4, 1940, in which you request my opinion as follows:

"A candidate for membership on the court of county commissioners of this county, subject to the action of the forthcoming Democratic Primary, filed his pre-election expense account with me on yesterday, Friday, May 3, 1940. Please advise me on the following questions:

"1. Was said pre-election expense account filed within the time provided by law?

"2. If not, what are my duties, as Judge of Probate, in the premises?"

Sections 593 and 594 of the Code of Alabama, 1923, read as follows:

"Section 593. Filing statements itemized, of detailed amount of expenditures, contents of such statements. — Not more than ten days, **nor less than five days prior to the election** and within fifteen days after the election, every committee shall file statements giving an itemized, detailed form, including names, items and detailed amounts, covering all of the expenditures made directly or indirectly, and all obligations, debtors or liabilities assumed or incurred at the time of filing of said statement shall include the names of all contributors of amounts in excess of ten dollars, with amounts given by each, and a list of all gifts, loans or contributions made. Such statements shall itemize all moneys expended in sums over five dollars, and shall give the names of the various persons to whom such moneys were paid, the specific nature of each item, by whom the service was performed, and the purpose for which it was expended. There shall be attached to such statement an affidavit subscribed and sworn to by the treasurer of said committee setting forth in substance that the statement thus made is

in all respects true, and that the same is a full and detailed statement of all moneys, securities or equivalents for money coming under the control or custody of the committee and by them expended directly or indirectly." (Emphasis supplied)

"Section 594. Affidavit of candidate, when made to statement of expenses. — If such statement is filed by a committee on behalf of any candidate, there shall also be attached to such statement an affidavit subscribed and sworn to by said candidate, setting forth in substance that said statement is to the best of his knowledge and belief in all respects true, and that he has not in person made any expenditures or received any contributions which are not set forth and covered by said statement. The failure of any committee designated by any candidate to file the statements herein required in the form and at the time specified, is a corrupt practice. **If the statement required to be made prior to such election is not made by any candidate and committee for him, the name of such candidate shall not be placed upon the ballot to be used in such election.**" (Emphasis supplied)

This office in an opinion to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of March 30, 1936, Quarterly Report of Attorney General, Vol. II, page 346, Biennial Report of Attorney General, 1934-36, page 610, held that the provisions of the Corrupt Practice Law were not in any way modified or repealed by the 1931 Primary Act (Act No. 56, H. 73, approved February 25, 1931, General Acts, 1931, page 73), but that the same were applicable to Primary Elections held in accordance with the provisions of said act.

Pre-election expense accounts of candidates in Primary Elections held in accordance with the provisions of Act No. 56, supra, required to be filed by Section 593, supra, must be filed on or before midnight Thursday preceding the election, as all regular Primary Elections are held on Tuesday. Cf. Opinion to Hon. Henry N. Hughes, Chairman, Montgomery County Democratic Executive Committee, Montgomery, Alabama, under date of June 22, 1933, Biennial Report of Attorney General, 1932-34, page 267, holding that under the statutory provisions for the issuance of absentee ballots "not more than thirty days nor less than five days" before an election held on Tuesday, such ballots might be issued on Thursday preceding the election.

The premises considered, my answer to your first inquiry is in the negative.

As to your duties as Judge of Probate in the premises, it is my opinion that you should not place the name of such candidate on the ballot. See the emphasized portion of Section 594, supra, and opinions of this office rendered to the Judge of Probate, Clarke County, Grove Hill, Alabama, under date of September 27, 1930, Biennial Report of Attorney General, 1928-30, page 955, and to Hon. W. L. Pratt, Judge of Probate, Bibb County, Centreville, Alabama, under date of January 7, 1933, Biennial Report of Attorney General, 1932-34, page 119.

If the ballots have already been printed, then you should blank out the name of such candidate from the ballot so that it will not be legible. See opinion of this office to Hon. Allen Stewart, Sheriff, Autauga County, Prattville, Alabama, under date of April 10, 1940, a copy of which is herewith enclosed for your information. In this connection, your attention is called

to the fact that under the provisions of Section 17 of Act No. 56, supra, you have until midnight Saturday preceding the election to be held on Tuesday (not less than three days before the election) to deliver all necessary election supplies, including the ballots, to the sheriff of the county to be in turn delivered by him to the election officials.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 7, 1940.

Hon. Sim L. Howell, Chairman,
Board of Revenue and Control,
Morgan County,
Decatur, Alabama.

A person or persons conveying an insane person to the hospital for the insane is entitled to be paid all necessary expenses when shown to be reasonable.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 3, 1940, in which you request my opinion as follows:

"Please forward to this office at an early date your interpretation of Section 1445 of the Code of 1923, which states the following:

"The Judge of Probate shall depute one or more persons, relatives, friends or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the County Treasury on order from the County Commissioners."

Section 1445 of the Code of Alabama, 1923, is the statutory authority for the county governing body to pay the costs of conveying insane persons to the insane hospital in this state. That section is in words and figures as follows:

"Section 1445. Conveying patient to hospital.—The judge of probate shall depute one or more persons, relatives, friends, or officers, as he may see fit, to convey the patient to the hospital, and all necessary expenses incurred in conveying an indigent patient to the hospital shall be paid out of the county treasury on order from the county commissioner."

This office has heretofore ruled that the county cannot enter into a contract with the sheriff or any other person to convey such patients to the insane hospital and pay anything other than the costs actually incurred.

In my opinion, there is no statutory limitation on the amount which the county governing body may pay for transporting insane persons to the hospitals of the state. The county governing body should, however, see that such persons are conveyed at the lowest possible cost. Each case must necessarily stand on its own facts. Biennial Report of Attorney General, 1936-38, page 274.

I am of the opinion that the county governing body of Morgan County may legally pay for having an insane prisoner, who is suffering from a broken back, conveyed to an insane hospital in this state by means of an ambulance.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 10, 1940.

Hon. Roy Mayhall, Member,
House of Representatives,
Winston County,
Haleyville, Alabama.

Counties — Libraries—

1. County may make appropriation out of surplus in general fund for support of free public library.
2. County may not make appropriation for support of free public library out of its share of sales tax and its share of earmarked proceeds of Alabama Beverage Control Act.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 26, 1940, in which you request my opinion as follows:

"HB No. 328, passed during the last Legislature, permits the Court of County Commissioners or other governing body of the county to establish and maintain or aid in establishing and maintaining free public libraries for the use of the citizens of the county. Said Act further provides that the Commissioners or other governing body may make appropriations from the County treasury to support said libraries.

"We would like to know if, in your opinion, donations may be made to such libraries from any fund other than the general fund. Could a free public library, which is for the general welfare of the people, be aided from funds received by the County which are earmarked for public welfare?

"We would appreciate your opinion if possible before the second Monday in May, the meeting date of the County Commissioners. This opinion is requested by the undersigned as County Solicitor, and by Hon. Frank M. Johnson, Judge of Probate of Winston County."

Act No. 198, H. 328, approved March 16, 1939 (General Acts, 1939, p. 350) authorizes county governing bodies to establish and maintain or aid in establishing and maintaining free public libraries for the use of the citizens of the respective counties, providing that:

"And to that end may accept gifts, donations and bequest of land, buildings, or money therefor, and may make appropriations from the county or municipal treasury in support thereof in such sums as they may deem proper." (Emphasis supplied)

In *Weaver v. Tidwell*, 228 Ala. 169, 170, 153 So. 218, it was held by the Supreme Court that an act providing for payment of the compensation of probate judges and members of the county governing bodies for services rendered in connection with roads "to be paid out of the county treasury" meant that the payment was to be made out of the "general fund."

Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, p. 16) commonly called the Sales Tax Act, in Section XXXV thereof reads in pertinent part as follows:

"* * * Provided that the funds divided and distributed to the several counties of the State, as hereinabove provided for, shall be used exclusively for full-time health service in cooperation with the State Board of Health and/or the Federal Government; for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government; and for extension service in cooperation with the Alabama Agricultural Extension Service and/or the Federal Government, at the discretion of the commissioners court, board of revenue or other governing bodies of the several counties of the State."

It will be seen that the Sales Tax Act requires that the sales tax distributed to the counties be paid, not into the general fund, but into a special fund to be used exclusively for the purposes therein mentioned.

It follows that since Act No. 198, supra, authorizes the county governing body to make appropriations "from the county * * * treasury" and since it has been held by the Supreme Court that "county treasury" means "general fund" such act confers no authority to make appropriations from the sales tax fund.

While it is true that in Section XXXV, supra, authority is given to the county to use the proceeds of the sales tax, distributed to it for public welfare in cooperation with the State Department of Public Welfare and/or the Federal Government, a determination of whether or not the county may use these sales tax funds for the establishment of a free public library under the general authority of Section XXXV depends upon whether or not the State Department of Public Welfare and/or the Federal Government determines that this expenditure will be for "public welfare."

It will be noted that the sales tax act provides that the money can be spent only "in cooperation with" the agencies mentioned. These words have

been construed by the Supreme Court of Alabama in the case of **Tuscaloosa County v. Walker**, 235 Ala. 293, 178 So. 543. The author of the Tuscaloosa County opinion, Mr. Justice Gardner, gives a clear conception of the attitude of the Supreme Court with regard to the expenditure of the sales tax money. I quote below the pertinent part of Justice Gardner's opinion:

"Clearly, therefore, when the Legislature, in Section 21, supra, speaks of expenditure of these funds in co-operation with the county authority, it was not meant that the latter could exercise its own discretion as to the wisdom of such expenditures, and its own judgment as to what in fact was embraced within the influence of the activities of these various governmental agencies. We think the discretion referred to as resting in the county authority was the ascertainment of the purpose or purposes for which the funds were to be expended.

"Thus the county maintains its own initiative and autonomy in determining the purpose or purposes for which the money is to be expended. **But we think it equally clear that it was the legislative intent that these State Agencies were to exercise their judgment as to whether or not the expenditures were within the meaning of the terms 'public health,' 'public welfare,' and 'agricultural extension service.'**" (Emphasis supplied)

In an opinion rendered by this office under date of June 30, 1939, to Hon. J. R. Copeland, Judge of Probate, Blount County, Quarterly Report of Attorney General, Vol. XV, page 343, this office, after setting forth the foregoing quotation from the Supreme Court's opinion, concluded:

"From a reading of the opinion of the Supreme Court, it will be seen that the court of county commissioners board of revenue or other like governing body of the county may determine the purposes for which the money in question is to be expended with the limitation that the purpose or purposes must come within the limits set out in the act, and further that the determination of whether or not the purpose is within the cognizance of the Act, be left up to the State agency concerned therewith.

"Therefore, it is my opinion that if the project proposed in your county is approved by the appropriate State agency, your court of commissioners may appropriate money received by your county from the Sales Tax to promulgate this project."

It is my information that the State Department of Public Welfare, by resolution of the State Board of Public Welfare of March 3, 1938, has ruled that only such matters as fall within the Public Assistance categories, to wit, Old Age Assistance, Aid to the Blind, Aid to Dependent Children, Temporary Aid, and Aid to the Mentally and Physically Handicapped, were to be included within the term "public welfare."

You are, therefore, advised that the sales tax funds may not be used for the purpose of the establishment and maintenance of a public library, or for aiding in the establishment and maintenance thereof.

With regard to your right to make expenditures for this purpose from the proceeds of the Alabama Beverage Control Act, which is Act No. 66, H. 44, which became a law under Section 125 of the Constitution on Febru-

ary 2, 1937 (General Acts 1936-1937, page 40), I wish to call your attention to Act No. 401, H. 886, approved September 15, 1939 (General Acts, 1939, page 526) the pertinent part of which is as follows:

"Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Departments of Public Welfare."

You will note from this section that ten per cent of the funds derived from the net profit of the State Liquor Stores under the provisions of the Act are paid into the Treasury of the State to the credit of the General Fund of the sixty-seven counties. These funds may, of course, be expended by the county for any lawful purpose after the preferred claims set forth in Section 231 of the Code of Alabama, 1923, as amended, and all other involuntary obligations against said fund have first been paid, provided there exists a surplus in the General Fund sufficient to permit the desired appropriation.

If, therefore, a surplus exists in the General Fund after the payment of all involuntary obligations, the county governing body may legally make the appropriation from said fund concerning which you inquire. Cf. Opinion to Hon. Chas. W. Lee, State Comptroller, dated August 27, 1937 (Quarterly Report of Attorney General, Vol. VIII, page 202).

You will also note that an additional ten per cent is paid into the treasury of the State to the credit of the sixty-seven counties to be used by the counties for the purposes of Public Health, Old Age Pensions and for "the other purposes of the County Departments of Public Welfare." Applying the reasoning hereinabove followed in restricting the use of the sales tax proceeds, you are advised that the county is without authority to expend this portion of the proceeds of the State Liquor Stores for equipment and maintenance of such public libraries, or for aiding in equipping and maintaining the same.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 11, 1940.

Hon. G. H. Boyd,
Register, Circuit Court,
Jefferson County,
Birmingham, Alabama.

State — Court Costs—

Liability of State for court costs when state is party plaintiff, discussed generally.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of January 19, 1940, in which you request my opinion as follows:

"We have docketed in this Court about twenty suits in which the State of Alabama was a party, and which have proceeded to final decree, — in all of which cases the costs of court are unpaid. These suits are of several sorts and nature, and although it is not our contention that the State of Alabama is liable for, or should pay the court costs in all of them, we would desire an opinion, — for our protection and information, — as to the liability of the State therefor.

"We have twelve cases filed by the State of Alabama, On Relation of George Lewis Bailes, Solicitor of the Tenth Judicial Circuit of Alabama, the purpose of all of which is to enjoin the operation of road houses, barbecue, sandwich and drink stands, etc., as public nuisances. In nine of these cases the costs of court were taxed against the respondent or respondents, for which execution issued, being returned 'no property found.' Two of the cases were dismissed for want of prosecution, and the costs taxed against the State of Alabama. One of such cases was dismissed on motion of the complainant, and costs taxed against the State of Alabama.

"We have four cases filed by the State of Alabama praying for injunction and other relief against respondents for failure to comply with the provisions of the 'Sales Tax Act.' Two of such cases were dismissed for want of prosecution, and costs taxed against the State of Alabama. One of such cases was dismissed on motion of the State of Alabama and costs were taxed against the respondent, for which costs execution against the respondent has been returned 'no property found.' One of such cases was dismissed by agreement of the parties, and costs taxed against the State of Alabama.

"We have a case styled 'Frank Bainbridge, Appellant vs. State Tax Commission of Alabama, Appellee,' same being an appeal from the assessment of income tax by the State Tax Commission. In this cause the Appellant was successful upon the trial, and costs of court were taxed against the State of Alabama. We have a case styled 'State of Alabama vs. H. E. Riggan, et al,' same having been filed by Honorable A. A. Carmichael in his then capacity as Attorney General, which said bill was filed for the purpose of quieting title to certain real property situated in Jefferson County, Alabama. The respondents suffered a Decree Pro Confesso; the relief was granted as prayed to the State of Alabama, and the costs of court taxed against the State of Alabama. (In connection with this case, may I invite your attention to Section 9910 of the Code of Alabama.)

"We have two cases filed by the State of Alabama seeking the forfeiture and condemnation of certain paraphernalia, etc., alleged to have been used in the operation of a lottery (Acts 1931, page 806). In these

cases, demurrers were sustained to the bills, the cases dismissed and the costs of court taxed against the State of Alabama.

"We have one case in which a bill was filed by the Solicitor of Jefferson County, Alabama for condemnation of motor vehicle alleged to have been used in the transportation of illegal liquors. By the final decree in this cause, the Court ordered the motor vehicle restored to the claimant therein and taxed the costs of court against the State of Alabama.

"We feel that it would be useless and prolate to discuss each separate and several case, as all of them fall into one of the categories above described. We also believe that it would be useless work to send you at this time an itemized cost bill in each separate case, since we feel that you probably will hold that the State should not,—and will not,—pay the costs in some of the cases. However, we do request that you favor us with an opinion as to the liability of the State for the costs accrued in each separate and several classification of cases as above shown.

In my opinion, court costs may be paid by the State of Alabama in cases where the State of Alabama is a party plaintiff, subject to certain limitations hereinafter set out.

I wish to refer you to the opinion, extended upon application for rehearing, written by Mr. Justice Thomas of the Supreme Court, in the recent case of **State of Alabama v. E. W. Inman**, 8th Div. 33(MS), handed down on April 4, 1940, in which he ably treated the whole subject of the liability of the State of Alabama for court costs. In this opinion the Supreme Court said:

"There are several decisions holding that in civil cases, where the state was plaintiff, costs may be taxed in adverse judgment against the state and counties. — **The State, use of Coosa County, v. Parker**, 83 Ala. 270, 3 So. 552 (wherein it was held that a judgment may be rendered for costs, a judgment *scire facies*); **State v. Donaldson**, 209 Ala. 400, 96 So. 617 (wherein the subject was tax valuations and costs were adjudged against the county, the state and county being parties plaintiff); **Bynum Bros. v. State**, 216 Ala. 102, 112 So. 348 (where the proceeding was by the state for taxes and it was held that the provisions of Section 7221, Code, may be applied as to court costs). The effect of Section XIV of the Constitution was not considered in either of these decisions."

It must be understood in the beginning, of course, that while costs may be assessed against the State, that such right is dependent upon definite statutory authority for costs in the first instance. No right for costs exists at common law. Reference is again made to **State v. Inman**, *supra*, as follows:

"It will be noted that the right to court costs in any case is dependent on statutory provisions, there being no such right at common law.—**Ex parte Cudd**, 195 Ala. 80, 70 So. 721; 5 Ala. Digest, p. 400."

The Supreme Court, in the case of **State v. Inman**, *supra*, held that statutes providing for costs against the State are not violative of the Constitution:

"When the instant statutes" (Section 6518 and 7221 of the Code of Alabama, 1923)" for costs in civil cases where the state is a party plaintiff are construed, as we have indicated, and applied to current revenues of the state and its respective departments, they are not offensive to Section XIV or to Section 213 of the Constitution of Alabama, as amended. — Skinner's Ala. Constitution, Annotated, Art. I, Section XIV, p. 127; Art. XXIII, Section XXVI, p. 987."

The next question preliminary to an answer to your request is: From what source may costs in cases in which the State of Alabama is a party plaintiff and is taxed with the costs, be paid? This is best answered by another quotation from the case of *State v. Inman*, supra, as follows:

"It may be well to indicate that court costs adjudged against the state may be paid out of a due appropriation to any department for which the name of the state is employed and is acting, or out of the available general fund of the state when so acting and suing for the state's general fund, revenues or properties. If there are no such general or special funds that may meet such payment, under the Budget Act, then such costs may be allowed and paid out of the appropriations to the Governor's contingent fund or the Governor's emergency fund, or from available funds appropriated for the State Board of Adjustment and allowed as a proper claim against the state. — *Ballenger Const. Co. v. State Board of Adjustment*, 234 Ala. 377, 175 So. 387; *Turner v. Lumbermens Mut. Ins. Co.*, 235 Ala. 632, 180 So. 300; General Acts 1935, p. 1164; General Acts 1936-37, Ex. Sess., p. 205."

It should be noted here that court costs assessed against the State may be paid only from available funds for the fiscal year. See *Inman v. State*, supra.

With the above general observations concerning authority of the State of Alabama to pay court costs in mind, I shall consider each of the types of cases named by you in the order named, in answering your question of whether or not the State may pay the costs assessed therein.

The first type of cases named by you are classified by you as public nuisance cases. Of this classification you state, "Two of these cases were dismissed for want of prosecution and the costs assessed against the State of Alabama." You also state that "one of these cases was dismissed upon motion of the complainant and costs taxed against the State of Alabama." In my judgment, the State was the unsuccessful party in the above cited cases, and upon proper taxation of the costs against it, upon authority of the above quoted case of *State v. Inman*, the State of Alabama became liable for such costs.

Reference is again made to *State v. Inman*, supra, wherein the Court said:

"In Section 6518, Code, it is provided that the 'state may sue in circuit court in chancery or equity matters, and the suit is governed by the same rules as suits between individuals. * * * and if unsuccessful, the state is liable for costs as individual suitors are. * * *'"

See also *Pritchard v. Fowler*, 146 Ala. 187, 40 So. 955; *Hilliard v. Brown*, 103 Ala. 318, 15 So. 605.

You further state that in nine of these cases the costs of court were taxed against the respondent or respondents, for which execution issued, being returned "no property found." I wish to refer you to Section 6518 of the Code of Alabama, 1923, which provides as follows:

"6518. State may bring suit in circuit court.—The state may sue in the circuit court in chancery or equity matters, and the suit is governed by the same rules as suits between individuals. The solicitors of the circuit in which the suit is pending must attend to the same on the part of the state, and the governor may employ assistant counsel, if he deem it necessary and the circuit judge may determine the amount of compensation; and if unsuccessful, the state is liable for costs as individual suitors are. The direction of the executive of the state in writing is sufficient authority to the attorney for bringing such suit."

I wish to further refer you to Sections 7263 and 7805 of the Code of Alabama, 1923, which provide, as pertinent, as follows:

"7263. When execution against plaintiff for his own costs; penalty for failure to collect, etc. — The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the cases was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant but for none other, to be collected may be rendered on motion in the circuit court of such county, in the name of the clerk or judge of probate issuing the execution, against the sheriff or his sureties, or either of them, upon three day's notice, for dereliction of duty on the part of the sheriff for failing to return, levy, or collect such execution so sued against the plaintiff or against the plaintiff and his sureties for such costs, as follows: * * *"

"7805. When against plaintiff for his costs. — When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

In my opinion, sufficient authority exists under the above quoted statutes to authorize payment of that part of the costs which arose at the instance of the State in each of the cases where execution has been issued against the respondent and returned "no property found."

The source from which costs taxed against the State may be paid has been heretofore pointed out in a quotation from the case of *State v. Inman*, supra. It will be noted that the cases thus far under consideration are not brought on behalf of the revenue or properties of any department of State government. In the above cited case of *State v. Inman*, however, the Supreme Court, in considering a situation of this kind, said:

"If there are no such general or special funds that may meet such payment, under the Budget Act, then such costs may be allowed and paid out of the appropriation to the Governor's contingent fund or the Governor's emergency fund, or from available funds appropriated for

the State Board of Adjustment and allowed as a proper claim against the state."

It is therefore my opinion that the costs in the public nuisance cases above named by you, subject to the limitations heretofore set out, may be paid by the State of Alabama from current appropriations named by the Supreme Court, as above quoted, which are, first, upon approval of the Governor, from the Governor's Emergency Fund, or from the Governor's Contingent Fund. Second, if the Governor should not deem it wise to expend these funds for this purpose, then such claims, in my judgment, may be presented to the Board of Adjustment, and, if allowed by the said Board, be paid in accordance with the provisions of law for the payment of claims so allowed.

The second classification of cases named by you are cases praying for injunctive and other relief against respondents for failure to comply with the provisions of the Sales Tax Act. You state that two of these cases were dismissed for want of prosecution and costs taxed against the State of Alabama. You further state that certain of these cases were dismissed by agreement of the parties and the costs taxed against the State of Alabama. It is my judgment that all the costs in all of these last named cases may be paid from the current collections from the Sales Tax (Section XXXV of the Sales Tax Act) under authority of *State v. Inman*, above cited. See also my answer to your question concerning public nuisance cases.

You further state that in one of these cases arising under the Sales Tax Act the costs were taxed against the respondent, and execution against the respondent was returned "no property found." It is my judgment that authority for the State to pay those costs arising at the instance of the State in such a case from the current collections from the Sales Tax exists as heretofore shown in my answer to your question concerning public nuisance cases.

In reply to your question concerning the costs in the case styled "Frank Bainbridge, Appellant, v. State Tax Commission of Alabama, Appellee," being an appeal from the assessment of income tax by the State Tax Commission, it is my judgment that since the appellant was successful upon the trial and the costs were taxed against the State of Alabama, that the costs may be paid from the current collections from the Income Tax (Section 345.46 of the 1935 Revenue Act) under the authority heretofore pointed out in this opinion.

Concerning the case styled "State of Alabama v. H. E. Riggan, et al.," which case involved title to certain real property situated in Jefferson County, Alabama, to which the State asserted a claim, and in which case a decree pro confesso was entered against the respondents, and the costs of court were taxed against the State of Alabama, it is my judgment, on the basis of the above cited authorities, that such costs may be paid from the funds of the department of the State government whose funds or properties would have been benefited by the successful outcome of the suit for the State. Reference is made to Section 9910 of the Code of Alabama, 1923, which provides as follows:

"9910. Decree when defendant fails to answer, or disclaims interest; costs. — No decree for costs shall be had against a defendant who suffers a decree pro confesso against him, or who, in his answer, dis-

claims all title to, interest in, or incumbrance, on such lands; but the court shall, in such cases, without further proof, decree that such defendant has no estate or interest in, or incumbrance on, such lands, or any part thereof; and any defendant who shall, by answer under oath, deny that he claims, or ever has claimed or pretended to have, any estate, interest, or incumbrance in or upon such lands or any part thereof, shall be entitled to recover his costs in the suit."

The next class of cases enumerated by you concerns the "forfeiture and condemnation of certain paraphernalia, etc., alleged to have been used in the operation of a lottery (Acts of 1931, page 806)." You state that in these cases demurrers were sustained to the bills, the cases dismissed and the costs of court taxed against the State of Alabama.

Act No. 671, H. 423, approved July 25, 1931, General Acts, 1931, page 806, referred to by you, in my judgment, does not offer authority for payment of the costs here considered. You will not that the above named act of 1931 provides that costs shall be paid upon any decree of condemnation and forfeiture was entered. Demurrers were sustained to the bills and the cases dismissed. It is my judgment, that these cases are properly classified as cases in which the State of Alabama was party plaintiff and unsuccessful in the suit. Upon authority of the above quoted case of *State v. Inman*, the State of Alabama became liable for such costs, and, in my judgment, such costs may be paid upon authorities pointed out in my answer to your question concerning public nuisance cases, to which I wish to here refer you.

In the case set out by you concerning condemnation of a motor vehicle alleged to have been used in the illegal transportation of alcoholic liquors in which the final decree ordered the motor vehicle restored to the claimant thereof, and taxed the costs of court against the State of Alabama, it is my opinion that these costs should be paid according to the provisions of Section 4785 of the Code of 1923. This section provides as follows:

"4785. Payment of costs when decree rendered against state.—In all cases filed under this article for the purpose of condemning and selling conveyances and vehicles of transportation of any kind on account of their use in the transportation of prohibited liquors or beverages, if a decree shall be rendered against the state the court costs shall be paid out of the law enforcement fund provided for in this article, said payment to be made on warrant of the auditor, upon receipt by the auditor of the bill of costs, certified as being correct by the register of the circuit court in which such case shall have been tried, which cost bill should also hear the approval of the attorney-general and the governor before warrant shall be drawn."

These costs, in my opinion, are payable by the State of Alabama from the Law Enforcement Fund, as provided for in the above quoted provisions of law. See authorities, *supra*.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 13, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Fines and forfeitures cannot be paid except with money.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 29, 1940, in which you request my opinion as follows:

"Please refer to the following Local Acts—1923, Page 244; 1933, Page 25; 1925, 82—and advise me in answer to the question given below:

"1. Is the Clerk of the Inferior Court of Autauga County entitled to receive 5% commission on fines paid in this Court with officers Fine and Forfeiture claims instead of cash?"

In answering your request, I call your attention to Section 4038, Code of Alabama, 1923, which is as follows:

"Section 4038. Fines to go to county, and judgment accordingly.—All fines and forfeitures shall be paid in money, and shall go to the county in which the indictment was found, or the prosecution commenced, unless otherwise expressly provided; and judgment therefor must be entered in favor of the state, for the use of the particular county."

It can be seen from the above quoted section that under the general law all fines and forfeitures are payable in money only. Therefore, the clerk is without authority of law, in the absence of local legislation, to accept officers' or state witnesses' claims which have been registered against the fine and forfeiture fund in payment of fines. Quarterly Report of Attorney General, Vol. III, page 193. This being true, he is not entitled to any fees for the services mentioned in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 13, 1940.

Hon. A. L. Hasty,
Judge of Probate,
Marengo County,
Linden, Alabama.

Licenses — Vending Machines—

No vending machine license necessary for vending machine located in place of business where a privilege or dealer's license has

been obtained by the operator of such place of business for the sale of the articles vended by such machine. (Schedule 154 of 1935 Revenue Laws, as amended by Act No. 398, H. 827, approved September 13, 1939, General Acts, 1939, page 519).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 4, 1940, in which you request my opinion as follows:

"Has there been a later opinion rendered with reference to the Coca-Cola vending machines, than the one rendered on Aug. 12, 1939? Schedule 154 was amended again Sept. 13th, 1939 and the Coca Bottling Company of this County is in receipt of a letter from Mr. Elmore of the Coca Cola Bottling Co. of Montgomery that the vending machine license had been lifted, and the only license due would be the retailers license under Schedule 128.

"If the vending machine license for selling Coca Cola has been lifted, please render me an opinion."

As stated in your letter, since the rendition of the opinion to Hon. Matt A. Boykin, Judge of Probate, Mobile County, Alabama, under date of August 12, 1939, Quarterly Report of Attorney General, Vol. XVI, page 136, the Legislature, by an act approved September 13, 1939 (Act No. 398, H. 827, General Acts, 1939, page 519) has amended Schedule 154 of the General Revenue Laws of 1935. (The effect of this amendment is that the securing of the license levied by Schedule 128 for each person engaged in the business of selling at retail soft drinks, etc., now entitles such licensee to maintain a vending machine in his place of business without the necessity of securing an additional license for such vending machine.)

Your attention is directed to the following proviso which was inserted into Schedule 154 by the 1939 Legislature:

"Provided that no license shall be required under this schedule where a privilege or dealer's license is required by this Act for the sale of such articles and such privilege license shall have been obtained by the person, firm or corporation operating the place of business where such machine is located, or the owner of such vending machine shall have secured such privilege license as required herein."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

(7, 21, 51, Sec. 482, Code)

May 13, 1940.

Hon. John S. Golson,
Judge of Probate,
Butler County,
Greenville, Alabama.

Counties — Crippled children—

Commissioners' court may make appropriation, from funds described, to State Board of Education to be used by such Board of Education for the relief of **needy** (poor) crippled children in the county donating such monies.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 17, 1940, in which you request my opinion as follows:

"Some of the young women of this City, members of the Argus Club, are interested in aiding crippled children of the County and have done some praiseworthy work in giving assistance to needy crippled children, and they have made a request to the Commissioners Court of the County to make a contribution to assist in the work.

"It is my understanding that the work is being done in conjunction with the State Board of Education. Members of the Commissioners Court are willing to make some reasonable appropriation to assist in doing the work, and I shall appreciate it if you will advise me as soon as you can whether you know of any authority or law by which such an appropriation or contribution can be made from any of the funds of the County.

"It is contemplated that the money appropriated by the Commissioners Court of this County will be used exclusively for crippled children in this County."

In my opinion, the commissioners' court is authorized to contribute monies to the State Board of Education, provided such monies appropriated will be used exclusively for the relief of the **needy** (poor) crippled children of Butler County. The funds which may be used for this purpose are treated, *infra*.

By Act No. 398, H. 829, approved September 9, 1935, (General Acts, 1935, page 870) the State Board of Education is authorized "to accept donations, gifts and bequests and to expend same on approval of the State Superintendent of Education, executive officer of the Board" for the purpose of providing medical, surgical, corrective and other services, care and treatment, and facilities for diagnosis, hospitalization and after-care for children who are crippled or who are suffering from conditions which lead to a crippling.

Subsection 6 of Section 6755 of the Code of Alabama, 1923, (as said section has been amended in respects not here material) provides that the court of county commissioners has authority "to make such rules and regu-

lations for the support of the poor in the county as are not inconsistent with any law of the State."

The Supreme Court of Alabama, in construing this grant of authority, has held that the governing body of the county, in providing for the support of the poor, is clothed with large powers, partly akin to each of the great divisions of governmental powers and with large discretion in the exercise of those powers—it is the sole judge of the mode and measure of relief to be granted, and is not confined to the inmates or instrumentalities of the county poorhouse. **Henry v. Cohen**, 66 Ala. 382. In the *Cohen* case, the question was presented as to the legality of the payment by the county for corn purchased and distributed to the poor generally, at their residences in the county, outside of the poorhouse of the county, and not to the poor in the county poorhouse. The court, speaking through Mr. Justice Stone, upheld the legality of such a payment.

The statements of Mr. Justice Stone are so apropos that I herewith quote at length from the opinion:

"The defense relied on is, that the Court of County Commissioners had no authority to purchase the corn for said purpose, nor to issue the warrant sued on. The court charged the jury, 'That if the warrant sued on was issued by the Court of County Commissioners of Pickens county, in payment for corn purchased by said court for distribution among the poor generally of said county, and said corn was received under orders of the probate judge, and delivered to the poor of the county outside of the poor-house, then the plaintiff was entitled to recover in this action.' This presents the sole question in this cause. The purchase having been made after the close of the war, it will be seen that no question arises as to the legality of the consideration. The appellant does not make that defense.

"Judge Cooley, in his work on Taxation, p. 88, says: 'The support of paupers, and the giving of assistance to those who by reason of age, infirmity, or disability, are likely to become such, is, by practice and the common consent of civilized counties, a public purpose. * * * Hospitals are also provided, where dependant classes can receive medical aid and assistance; and asylums, where the deaf, the dumb and the blind may be supported and taught, and where the insane may be kept from doing or receiving harm, and can have such careful and scientific treatment, with a view to their restoration, as they would not be likely to receive elsewhere. He would be a bold man, who, in these days, should question the public right to make provision for these benevolent objects. And this provision might not only be made by the establishment of institutions for the purpose, but private institutions might undoubtedly be aided with public funds in consideration of services to be rendered to the public, and expenses to be incurred by them, in assisting and relieving the same necessitous and dependent classes.' * * *

"Judge Story, Eq. Jur. Section 1139, speaking of charitable bequests under the civil law, says: 'If a legacy was given to the church, or to the poor generally, without any description of what church, or what poor, the law sustained it, by giving it, in the first case, to the parish church of the place where the testator lived; and in the latter case, to the hospital of the same place; and if there was none, then to the poor of the same parish.'

"We have made the citations above for the purpose of showing that pauperism and destitution, no matter from what cause they may spring, have always been regarded as matters of public concern, and that the care and maintenance of the destitute impose a public duty, which will justify and uphold a levy of taxes for the purpose. In England, there has long been a system of compulsory support of the poor, under which the local sub-divisions, into which their territory was divided, were compelled to maintain the paupers, having their domicile among them; and if they failed in this duty, a stranger could supply such necessities, and compel the parish, or local sub-division, to refund the money so expended. Many of the States of this Union have similar systems. See digest of their various rulings on their several statutes, in 10 U. S. Digest, first series, 586 to 642.

"In Alabama, we have not adopted a compulsory system, but have confided the subject to the Court of County Commissioners. That court has jurisdiction, 'to make such rules and regulations, for the support of the poor in the county, as are not inconsistent with any law of the State.' Code of 1876, Section 746, subd. S. 'The Court of County Commissioners may purchase and hold lands and other property proper for the erection and continuance of a poor-house, and may, at their discretion, dispose of lands now, or hereafter owned for such purpose, and make titles therefor, and may make all appropriations and orders proper for the erection and continuance of poor-houses, and for the regulation and government of the poor and poor-houses.'

"It is contended for appellant, that the power of the Court of County Commissioners to provide for the support of the poor, is limited to inmates of the poorhouse. This is too narrow a construction. **The entire power and jurisdiction over this very important function and duty of government is confided to this necessary and useful tribunal.** It is clothed with large powers, partly akin to each of the three great departments into which government is divided, and it is clothed with large discretion in their exercise. True, in the exercise of statutory, judicial powers, and in pronouncing judicially on the property rights of others, it is a court of limited jurisdiction, and its proceedings are to be tested by the intendments which pertain to statutory, limited jurisdictions.—2 Brick. Dig. 400, Section 14. **But, in the matter of levying taxes, and making provision for the support of the poor, these rules do not apply.**—Perry County v. Selma, Marion and Memphis Railroad, at the last term. **That court, in making provision for the poor, are sole judges of the mode and measure of relief, and are not restricted to the confines, or instrumentalities of the poor-house.**—City of Lowell v. Oliver, 8 Allen 247; Freeland v. Hastings, 10 Allen 550; Booth v. Town of Woodbury, 32 Conn. 118; Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518. * * *

"In the strong language of C. J. Black, in Sharpless v. Mayor of Philadelphia, 21 Penn. St. 144, 159, 'We are to deal with this strictly as a judicial question. However clear our convictions may be, that the system is pernicious, we can not put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it.'" (Emphasis supplied)

The premises considered, if your commissioners' court determines that there are **needy** (poor) crippled children in the county, and if it is desired

to give assistance to such **needy** (poor) children, then, in my judgment, the commissioners' court would be authorized to make an appropriation to the State Board of Education conditioned upon the use by the State Board of Education of such monies for the relief of **needy** (poor) crippled children in Butler County. Cf. Opinion rendered under date of November 14, 1939, to Hon. J. F. Davis, Covington County, Quarterly Report of Attorney General, Vol. XVII, page 249.

In making the appropriation, your county governing body would be authorized to expend funds from the general fund of the county provided there is a surplus in said fund after all involuntary obligations against the same have been paid, or from the general fund of the county enhanced by 10% of the net proceeds of the State Liquor Stores (Act No. 401, H. 886, approved September 15, 1939, General Acts, 1939, page 526) provided also that there is a surplus in said fund after all the involuntary obligations against the same have been paid.

Your commissioners' court may appropriate the sums received from the proceeds of the Alabama Beverage Control Act, which funds are divided equally among each of the several counties of the State under Act No. 401, supra, to be used for the purposes "of Public Health, Old Age Pensions, and for the other purposes of the county departments of public welfare" to the county department of public welfare of your county for the purposes here under consideration. Provided, of course, that the care of such crippled children comes within the "purpose of the county department of public welfare," which fact would depend upon whether or not such county department of public welfare advised the county as to its program in connection with crippled children, if such program had in fact been adopted by such county department and if such, in fact, was a part of its program.

The proceeds from the Sales Tax Act (Act No. 18, H. 82, approved February 8, 1939, General Acts, 1939, page 16) may be used only if the expenditure in question is determined by the State Department of Public Welfare and/or the Federal Government to be for "public welfare," as is provided in Section XXXV of such Sales Tax Act.

I am enclosing herewith an opinion rendered under date of March 15, 1939, to Hon. J. A. Carnley, Judge of Probate, Coffee County, Quarterly Report of Attorney General, Volume XIV, page 197, which discusses in detail the right to expend the proceeds of the Sales Tax and the proceeds from the State Liquor Stores.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 14, 1940.

Hon. H. E. Kendrick,
Tax Collector,
Dallas County,
Selma, Alabama.

Taxation — Tax Assessments — Description of Real Estate—
Credit to Tax Collector for Void Assessments—

1. Assessment of land described as so many acres in a tract of land described as a subdivision of a certain section, township and range, is void for uncertainty. Section 39 of 1935 Revenue Act.

2. Assessment of land described by reference to some record for further description, the assessment being, without more, void on the records of the assessor, also void. Section 39, supra.

3. Sale of land for taxes on land erroneously assessed, as above, is a void sale and conveys no title.

4. Tax Collector should report land so assessed in his "list of errors in assessments." so as to get credit for uncollected taxes based on the assessment. Sections 178, 179, 180 and 181 of 1935 Revenue Act.

5. Assessment of land described as so many acres in a certain corner of, or on a certain side of, a correctly described government subdivision is valid, and will support advertisement for sale, and sale for taxes of such land.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your recent request for official opinion follows:

"Please give me your opinion on the following:

"A. An assessment in which the Real Estate is described as 11 Acres in N $\frac{1}{2}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 5, Township 16, Range 8.

"B. An assessment in which the Real Estate is described as 10 Acres in the NW $\frac{1}{4}$ of the NW $\frac{1}{4}$, Section 10, Township 16, Range 8, for further description, see Deed Book 10, Page 10.

"C. An assessment in which the Real Estate is described as 8 acres in the NW corner of NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 16, Township 16, Range 8.

"D. An assessment in which the Real Estate is described as 4 acres on the West side of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 3, Township 15, Range 10.

"Will the above descriptions support advertising of notices to delinquent Owners Unknown per section 218 page 119, Revenue Code of 1935?

"Will the advertising of the above descriptions support Tax Sale? Sections 39, page 30, Revenue Code 1935, Section 251, p. 117, Section 224, page 121 Revenue Code 1935?

"If the above descriptions will **not** support advertising of notice to Owners Unknown or non-residents nor advertising for tax sale, what is the duty and what procedure shall the Tax Collector take in order that he may get credit for the amount of taxes charged to him in such cases for the current and not succeeding tax year?

"Please give me early reply. I have several such assessments now pending."

I am of opinion that the description above designated in paragraph marked "A" is void for uncertainty as hereinafter explained.

The description in paragraph marked "B" is certainly not a proper description for purposes of assessment of taxes, although it would probably be sufficient otherwise by reason of the reference to Deed Book 10, p. 10, provided the description there shown was sufficient to identify the land in question.

The description in paragraph marked "C", to-wit, 8 acres in the NW corner of NE $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 16, Township 16, Range 8, is a good and sufficient description.

Likewise, the description in paragraph marked "D", to-wit, 4 acres on the West side of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 3, Township 15, Range 10, is sufficient as hereinafter explained.

The test for determining whether or not a description of land is sufficient so as to pass title in a conveyance thereof has been thus stated by the Supreme Court of Alabama:

"* * * whenever the side, edge or corner be designated, if a side or end, lines should be extended so far from the parallel to the side or end lines, as, * * * would include the quantity; and if a corner, lines should be extended equal distances so far on the side and end lines, as, by running lines at right angles therewith, would include the quantity." **Wilkinson v. Roper**, 74 Ala. 140, 148.

In that case, the question was whether land described as "ten acres of the land off the Northwest corner," of a named sub-division could be found or located, and whether a conveyance so describing land was valid or not. The court held that such description was good and called for a square tract of land extending to the Northwest corner of the designated subdivision.

In **L. & N. R. R. Co. v. Boykin**, 76 Ala. 560, at page 565, discussing the question whether or not a tract of land described as two acres nearest the

railroad within a certain definitely located tract was void for uncertainty, the court held that the description was void, and observed:

"* * * no criteria are furnished, by which to determine in what directions, and how far in each direction, the lines shall be run, so as to include the two acres * * *. Had a definite starting-point and the base line been named, the lines would then have been run so as to include two acres * * * in superficial extent, and as nearly square as practicable." Citing *Wilkinson v. Roper*, supra.

See also *Hunt v. Freeman*, 63 Ala. 335; *Gaston v. Weir*, 84 Ala. 193, 4 So. 258; *Daniel v. Williams*, 177 Ala. 140, 58 So. 419; *Winsett v. Winsett*, 203 Ala. 373, 83 So. 117; *Martin v. Carroll*, 235 Ala. 30, 177 So. 144.

Section 39 of the 1935 Revenue Act (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, p. 256) prescribes the requirements of law as to description of real estate and provides that a description of land, less or other than a government subdivision, may be "by metes and bounds, or in some way by which it may be known"; and that a description of such case to be sufficient, must, without more, definitely locate and identify the property listed for assessment and taxation, and show the acreage included therein as nearly as known. In other words, when property is described otherwise than by section, township and range, or fractional part thereof, the description adopted must in each instance be sufficient, "without more, to definitely locate and identify the property," and must show the acreage thereof as nearly as known, or "the quantity of such land so listed," in the case of land described according to a map or plat in a city or town.

For this reason I am of opinion that the description in paragraph B of the request, supra, is sufficient to meet the requirements of the statute, because reference to "Deed Book 10, Page 10, is necessary as a further step to locate and identify the land assessed.

I conclude therefore that the descriptions in paragraphs A and B being insufficient, publication of notice and sale is not authorized, and that sale for unpaid taxes in such case would be void: (1) because the requirements of law as to description have not been complied with, and (2) because the lands sold could not be identified, or located with any certainty, so far as appears on the face of the assessment, **without more**.

Rigid adherence to the directions and forms of the statute as to assessment and collection of taxes is required in order to uphold title to land sold for payment of taxes. *Perry v. Marbury Lumber Co.*, 212 Ala. 542, 103 So. 580; *Morris v. Card*, 223 Ala. 254, 135 So. 340; *Bryce v. Morris*, 226 Ala. 627, 148 So. 326; *Henderson v. Simmons*, 234 Ala. 329, 174 So. 491.

Section 178 of the 1935 Revenue Act provides for report by the Tax Collector of "a list of such persons as have been over-assessed or wrongfully assessed * * * which shall be termed 'list of errors in assessments.'"

Section 179 of said Act is as follows:

"Section 179. At the same term, such court (i. e. the court of county commissioners) shall make a careful and rigid examination of such lists, and of the facts pertaining thereto, in consultation with the tax

assessors, and shall ascertain and determine what taxes contained in the lists of insolvents the collector could not, by the use of due diligence, have collected, and what taxes contained in the list of errors in assessments should not have been collected by him by reason of such errors, and shall correct such list accordingly, and shall credit the collector with the county taxes contained in such list as corrected, and shall ascertain what taxes are in litigation, and credit the collector with the county taxes so in litigation. The credits allowed the tax collector under this section shall be approved by the State Tax Commission."

Sections 180 and 181 of said Act provide for allowances and credits to the Tax Collector of such taxes as the collector "could not, by the use of a new account against him after giving effect to the credits and allowances aforesaid.

I find no provision of law in said 1935 Revenue Act as to credits or allowances to the Tax Collector for void or improper assessments, unless the provision above referred to may be construed to include such assessments, as I think they should. The Act cannot reasonably be construed to impose liability upon the collector for some error in the assessment of taxes which he was powerless to avoid.

I am of opinion, therefore, that for your own protection you should include in your "list of errors in assessments" all assessments obviously void by reason of void descriptions, and demand credit therefor. Otherwise, you would be put in the stultifying attitude of knowingly making a void sale in order to avoid a liability on your part.

You should thereupon make an escape assessment, using a proper description.

Inasmuch as the descriptions in paragraph C and D of your request are definite and certain, you should proceed as provided by law in the matter of sale of the land so described.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

Hon. U. G. Watford,
Sheriff, Houston County,
Dothan, Alabama.

May 14, 1940.

Transfers of Convicts to Penitentiary—

It is the duty of any jailer in Alabama to receive convict in transit to penitentiary upon demand of officer in charge of such convict, and to retain him safely in jail until called for by such officer, and such officer is not required to furnish order for jailer

receiving such prisoner or to give jailer receipt when prisoner is removed.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 19, 1940, in which you request my opinion as follows:

"I will appreciate very much if you will advise me at your earliest convenience, when the Transfer Agent from the Department of Corrections and Institutions come by Dothan and leave prisoners overnight, if I am required to ask them for an order to leave said prisoners overnight and take a receipt for said prisoners when the Transfer Agent leaves."

In answering your request, I call attention to Section 3612, Code of Alabama, 1923, which is as follows:

"Section 3612. Convicts confined in jail en route to penitentiary; duty of jailers.—It is the duty of all jailers, on demand of the officer in charge of any convict being conveyed to the penitentiary, to receive and safely keep such convict for the legal charge of feeding prisoners, whenever such officer may deem it necessary to have him secured for the night, or for any longer time they may be necessarily detained."

The above section makes it the duty of the jailer in charge of the jail in any county of Alabama, on demand of the officer in charge of any convict being transferred or conveyed to the penitentiary, to receive and safely keep such convict, but I find no authority for the jailer demanding an order for leaving the convict in his custody, nor do I find any authority for the transfer officer giving the jailer a receipt for the convict on such convict's being removed from the jail or custody of the jailer.

The Department of Corrections and Institutions informs me that all transfer agents are armed with a transfer order from the Department of Corrections and Institutions which is addressed to the sheriff of the county from which the convict is to be removed, and on receiving such convict, the transfer agent leaves with the sheriff a duplicate of the order and retains the original as his authority for making the transfer; and it is my opinion that when such transfer agent shows his order to any jailer in Alabama, it becomes the duty of such jailer to receive any convict in transit to the penitentiary and confine him in the jail until called for by the transfer agent, and no receipt is necessary to be given such jailer by such officer.

The sheriff should enter the release and discharge of such prisoners on his "jail book" as provided for in Section 10198, Code of Alabama, 1923, which section is as follows:

"Section 10198. Must keep record descriptive of prisoners in jail.—The sheriff must keep, in his office and subject to the inspection of the public during office hours, a well bound book, to be procured at the expense of the county, in which he must enter a description of each pris-

oner received into the county jail, showing the name, age, sex, color, and any other distinguishing marks, together with the charge for which such prisoner is held, the order and date of commitment, and the order and date of release.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 14, 1940.

Hon. I. J. Browder,
State Personnel Director,
Montgomery, Alabama.

Merit System Act — Compensation of employees of the Supreme Court—

The State Personnel Director may certify payrolls which contain salaries within ranges set forth in pay plan, even though the payment of such salaries would require more money than has been appropriated by the Legislature, but that portion of such salaries in excess of the amount appropriated and available for that purpose cannot be paid unless and until there is money appropriated and available for the full payment of the same.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 18, 1940, in which you request my opinion as follows:

"The State Personnel Board authorized me to present the following situation to you and request your opinion thereon:

"The State Supreme Court has requested salary raises for employees of the Court, which if put into effect would require more money for the payment of salaries than was appropriated by the Legislature for that purpose.

"Does the power to fix salary ranges vested in the State Personnel Board in the Merit System Act carry with it the power to approve salaries within those ranges, which would require for their payment more money than has been provided in the Appropriation Act, unless it can be determined that a surplus will be left for some other department?"

In my opinion, your inquiry should be answered in the affirmative, subject to the qualifications hereinbelow set out.

Subsection (a) of Section 11 of Act No. 58, S. 44, approved March 2, 1939 (General Acts, 1939, page 68), provides as follows:

"(a) It shall be unlawful for the State Comptroller, any county official, officer or employee, or any other fiscal officer to draw or issue any warrant on the state treasury, County treasurer, or County depository, for the payment of any salary or compensation to any person in the state service for personal services, unless the payroll, estimate, voucher, or account for such salary or compensation containing the name of the person to be paid shall bear the certification of the Director that the person or persons named therein are employees of the State and are legally entitled to receive the sums stated therein." (Emphasis supplied)

You will note that the Director is required to affix a certification to each payroll, etc. that the persons named on such payrolls are employees of the State and are "legally entitled to receive the sums stated therein."

In determining the answer to your inquiry, it becomes necessary to ascertain the meaning of the above quoted words. According to Webster's New International Dictionary (Unabridged), to "entitle to" is to give a right to; "to qualify for."

The Merit System Act authorizes and requires the establishment of a pay plan for all employees in the State Service and requires that each employee in the State Service shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed (Section 13 of Act No. 58, supra). The Supreme Court in **Heck v. Hall**, 190 So. 280, and this office in an opinion rendered to you under date of December 22, 1939 (Quarterly Report of Attorney General, Vol. XVII, page 401), held that a pay plan could be established and enforced as to all employees of the Supreme Court other than those protected by Section 281 of the Constitution of 1901. Under the Merit System Act, court employees, other than those excepted under Section 281, supra, are entitled to receive compensation at one of the rates set forth in the pay plan for the class of positions in which they are employed.

In my opinion, the word "legally entitled to receive the sums stated therein" imply only that the employee in question has qualified under the Merit System Act, i. e., has been employed according to its terms and that his name appears on the payroll at one of the rates set forth in the pay plan for the class of position in which he is employed. To hold otherwise would be to place the functions of the State Comptroller upon the Director of Personnel. It is stated in Field on **Civil Service Law** at page 105 that:

"The function of the (Civil Service) Commission is not that of a Comptroller General or Auditor."

Cf. **People ex rel. Bedford v. McWilliams**, 106 N. Y. S. 459.

It is true that Section 72 of the Constitution of Alabama, 1901, provides that:

"No money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof."

But this section does not, in my judgment, affect the answer to your question in any respect. As stated hereinabove, Subsection (a) of Section 11 does not impose the duty upon you, as Director of Personnel, to ascertain whether there is a sufficient appropriation or whether there is any appropriation to pay the employees whose names appear upon the payrolls presented to you by the appointing authorities. The fact that no appropriation has been made is not a matter which directs itself to your attention for, in my opinion, the question of whether an appropriation has been made or whether there are sufficient funds to pay the salary of a particular employee is a matter which addresses itself to the State Comptroller.

The action of the Board, in fixing the compensation of an officer or employee of the State over the amount appropriated for the compensation of said officer or employee, does not amount to an increase of that appropriation. However, any balance may be paid out of appropriations otherwise available for said purpose. In other words, if there is a deficit in the appropriation for the payment of a particular compensation, it may be supplemented by other appropriations that are available for said purpose. Cf. **Quarterly Report of Attorney General**, Vol. I, page 109; **Inman v. State** (Supreme Court MS); **Reynolds v. Taylor**, 43 Ala. 420; **Riggs v. Brewer**, 64 Ala. 282.

Let it be here clearly understood, however, that nothing set out hereinabove authorizes the State Comptroller to issue his warrant for the payment of that portion of salaries which exceed available appropriations for that purpose, unless and until there is money appropriated and available for the full payment thereof Section 24 of Act No. 37, S. 87, approved September 27, 1932 (General Acts, 1932, pages 35, 47) specifically provides that it shall be unlawful for any officer connected with any department, etc. of the State to which an appropriation is made, to expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted, or to consent thereto.

Section 213 of the Constitution, as amended by Amendment No. XXVI, proclaimed ratified August 2, 1933 (Proclamation Book E, pages 28-29), provides, as pertinent, that:

"To prevent future deficits in the State Treasury, it shall be unlawful from and after the adoption of this amendment for the State Comptroller of the State of Alabama to draw any warrant or other order for the payment of money belonging to, or administered by, the State of Alabama upon the State Treasurer, unless there is in the hands of such Treasurer money appropriated and available for the full payment of the same." (Emphasis supplied)

It thus appears that no payment of the excess of the salaries in question can be made until monies are appropriated and available for the full payment thereof.

It is my opinion that if, at the end of the fiscal year, there is a balance of such salaries for the payment of which no appropriation whatever is available, such balance is null and void, and does not constitute a debt against the State of Alabama. Section 213, as amended, *supra*.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 14, 1940.

Hon. J. A. Stephens,
Chief, Income Tax Division,
Department of Revenue,
Capitol.

Income Tax — Army and Navy Officers—

1. An Army or naval officer born and residing in Alabama until entry into the army or navy, irrespective of actual place of residence, and originally domiciled in Alabama, continues to be so domiciled in Alabama, continues to be so domiciled and is subject to the Income Tax Law of Alabama, in the absence of proof of change of domicile.

Revenue Act, 1935, p. 387, Section 345.1.

2. Burden of proof as to change of domicile is on such taxpayer, though he owns no property, earns no income, and has no place of abode in Alabama.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of April 24, 1940, follows:

"In re: Captain Virgil Childers Griffin, Jr. Income Tax Return, 1939.

"Recently Honorable T. L. Griffin, Post Office Box 436, Mobile, contacted you in regard to income tax liability of his brother, Captain Virgil Childers Griffin, Jr., a Naval Officer, whose original domicile was in the State of Alabama. Captain Virgil Childers Griffin, Jr., filed his income tax return with this office, showing a tax liability of \$137.04 but protested payment of the tax for reasons set forth in letters dated March 15 and March 30, copies of which are attached for your information.

"Pursuant to the plan suggested by the Attorney, it is requested that you give the matter careful consideration and let us have an informal opinion relative to the liability. In this connection, your attention is called to similar cases now pending in your Department, including an opinion relative to Army Officers and enlisted men residing on Government reservations.

"We are holding the file in suspense until we hear from you in regard to this matter."

"P. S. Mr. Griffin states that the above procedure is in line with your suggestion."

From the papers submitted with your request it appears that the taxpayer is a naval officer "on sea duty in the United States Fleet," and that he was not in Alabama at any time during the year 1939 and has no property, and inferentially, derives no income, in Alabama. In a letter addressed to the State Department of Revenue under date of March 30, 1940, the taxpayer writes as follows:

"(1) I was born at Montgomery, Ala., leaving the state to enter the Navy at the age of seventeen.

"(2) Since that time I have never been domiciled in the State of Alabama or owned any property therein or paid any taxes thereto.

"(3) In the intervening years I have lived and paid taxes in the States of Florida, Virginia and California; also in the Territory of Hawaii.

"(4) I own property in the state of Florida and I have paid the taxes upon this property since acquiring it in 1924.

"(5) I am listed as a resident of Alabama pursuant to the requirements of the Navy Regulations to the end that, in the event of my death my family and remains will be transported to Alabama at government expense, or in the event of my retirement my family and myself will be so transported.

"(6) Upon my retirement from the Navy in the next few years, my present intention is to acquire a permanent residence in the State of Alabama, there making my home; however, if the Alabama tax laws make it too expensive, I will not carry out this intention."

In my opinion, it may be fairly inferred from the foregoing statement that the taxpayer, although disclaiming that he has ever been domiciled in the State, has, as a matter of law his legal domicile in this State. I base this conclusion upon the fact that he was born in Alabama and actually resided in this State until he entered the Navy at the age of seventeen years, and the further fact that he offers no evidence whatever as to any change of domicile at that time or any time since then.

"Section 366, Code of Alabama, 1923, is as follows: T17 519"

"366. Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of said state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state."

From the authorities, it seems clear that certain propositions as to domicile are well established, to-wit:

1. The domicile of a parent determines the domicile of his minor child and such child's domicile will be presumed to continue as originally fixed in the absence of satisfactory proof of change.

Ex parte Fletcher, 225 Ala. 139, 142 So. 30.

2. Domicile once acquired is presumed to continue until abandoned with no present intention of returning, in the absence of proof as to the establishment of another place of residence with intent there to remain permanently or indefinitely.

Holmes v. Holmes, 212 Ala. 597, 103 So. 884;

Frederick v. Wilbourne, 198 Ala. 137, 73 So. 442;

Bragg v. State, 69 Ala. 204;

Caheen v. Caheen, 233 Ala. 494, 172 So. 618;

Ex parte Bullen, 236 Ala. 56, 181 So. 498;

McLeod v. Adams, 218 Ala. 424, 118 So. 636.

3. The burden of proof as to change of domicile rests upon the party seeking to avail himself of such change to establish the change by unequivocal, satisfactory evidence.

In **Sweeney v. District of Columbia**, decided by the United States Court of Appeals for the District of Columbia March 11, 1940, reported by the Prentice-Hall Service, the question of domicile was considered and discussed at length in connection with the question of liability for payment of tax upon intangibles. The conclusion was reached that in the statute under which the question arose the words "residence" and "domicile" were synonymous and interchangeable. The case turned upon correct decision as to the taxpayer's domicile, whether in the District of Columbia or in the State of Massachusetts, where he was born and maintained a place of residence until 1918. Since that time he had resided exclusively in the District of Columbia and held various government positions and engaged in rendering service for the United States Government.

The taxpayer maintained that there had been no change of domicile and that he was still in legal contemplation a resident or domiciliary of the State of his birth.

The Court observed:

"When a domicile is once established, it is presumed to continue until there has been a change of residence with the intention of establishing a new domicile. But when petitioner's father later moved to Washington to enter the Government Service, he expressly negated both by word and conduct any inference that he was intending to change his domicile by reason of the removal."

Citing: **Deming v. U. S.**, 37 F. (2d) 818, 5 App. D. C. 183; **Mitchell v. U. S.**, 21 Wall. 350, 22 L. ed. 587.

In the same opinion, it is also said:

"The state domicile could not be overthrown by mere proof of long residence during performance or by ambiguous showing of intention to change. * * * Evidence of intention to change must be clear and unequivocal, whether its effect be waiver of privilege or to overcome a presumption."

I am of opinion, therefore, on the strength of these authorities that in the absence of satisfactory proof, in the present instance, of any change of domicile, the taxpayer must be presumed to be a resident of, or domiciled in, the State of Alabama and, therefore, subject to pay income tax to the State of Alabama as authorized by the recent Act of Congress known as the Public Salary Tax Act of 1939. 26 U. S. C. A. p. 1163—Act of April 12, 1939, c. 59, 53 Stat. 574-577.

This result necessarily follows under the State Income Tax Law itself (Acts, 1935, p. 397, Section 345.1) subjecting to income tax all persons domiciled in Alabama whether or not actually residing there, as to all income wherever earned or received. *State v. Weil*, 232 Ala. 578, 168 So. 679.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 15, 1940.

Hon. L. E. Sellers,
Sheriff, Tallapoosa County,
Dadeville, Alabama.

It is the duty of the sheriff or jailer when a person is committed to jail or discharged therefrom, to file in regular order and safely preserve the process or order of the court by which the prisoner is committed or discharged.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 3, 1940, in which you request my opinion as follows:

"Please advise me whether or not it is necessary for the Sheriff to keep on file in his office a commitment and also an order or discharge for each prisoner placed in jail, whether the warrant be issued by the Judge of the County Court, Judge of Probate or the Justice of the Peace. My understanding of this is that he should keep a commitment and also an order of discharge only when the Justice of the Peace issues a warrant and makes it returnable to Justice Court."

It is my opinion that your inquiry must be answered in the affirmative. I call your attention to Section 4804, Code of Alabama, 1928, Michie, which I think answers your question fully and is as follows:

"Section 4804. Commitments and discharge filed and preserved.—It is the duty of the sheriff, or of the jailer under his direction, to file in regular order, and safely preserve the process or order by which any prisoner is committed to jail, or discharge therefrom, or an attested copy of such process or order,"

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 15, 1940.

Hon. J. M. McLeod,
Judge of Probate,
Wilcox County,
Camden, Alabama.

Elections—

1. Judge of Probate is not disqualified from handling absentee ballots in second primary election, if his name does not appear on the ballot, even though he may have been a candidate in the first primary election.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 11, 1940, in which you request my opinion as follows:

"As per our conversation over the telephone this morning, I am writing to ask you the following questions:

"In the May 7th Primary, I was a candidate for Probate Judge and therefore the duties of sending out Absentee Ballots fell upon the Sheriff. As I will not be a candidate on June the 4th, will the above duties fall upon the Sheriff or me as Probate Judge?"

An answer to your inquiry depends upon the construction to be placed upon the provisions of Section 2 of Act No. 179 S. 27, approved April 19, 1933 (General Acts, 1933, page 193), which provides, as pertinent, that:

"In any * * * primary election, when the judge of probate is a candidate for any office, he shall be disqualified from performing any of

the duties in reference to the handling of absentee ballots which are now or may hereafter be required to be performed by him, and all such duties shall be performed by the sheriff of said county."

It becomes necessary to determine whether a Judge of Probate who has received a majority of the votes cast in the first primary and has been certified by the County Executive Committee as the nominee of his party, as required by Section 29 of the 1931 Primary Act, as amended by Act No. 529, H. 844, approved September 22, 1939 (General Acts, 1939, page 823), still remains a "candidate" within the contemplation of Section 2, supra, at the time of the holding of the second primary election. The term "candidate" is commonly understood as designating the person voted for at an election. In short, a "candidate" is one who puts himself forward, or is put forward by others, for nomination or election to a particular office. See Words & Phrases, "Candidate."

Measured by this definition, it appears that a Judge of Probate who has received a majority of the votes cast in the first primary election and has been declared the nominee of his party by the County Executive Committee, as required by Act No. 529, supra, is no longer a "candidate" in the second primary election, but becomes ipso facto the nominee of the party.

The same reasoning is applicable to incumbent Judges of Probate who were candidates in the first primary election but whose names will not appear on the ballot to be used in the second primary election because of the fact that they did not receive a sufficient number of votes to entitle them to have their names placed thereon.

You are, therefore, advised that since you are not a candidate in the second primary election, it will be your duty to handle the absentee ballots in said election, as required by Act No. 178, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

May 16, 1940.

Inferior Courts—Execution and Levy—

The issuance of a writ of garnishment by the Clerk of the Inferior Court created under Act No. 140, S. 46, approved July 7, 1927 (Local Acts, 1927, page 54), does not have the same effect as an execution but merely keeps the judgment from becoming dormant.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of April 18, 1940, in which you request my opinion as follows:

"The Local Acts of 1927, page 54, which created an Inferior Court in Precincts 2 and 33, Jefferson County, provide in Section 15, page 59, that a writ of garnishment shall have the same effect as an execution.

"1. Does this provision have legal effect or do the statutes on Execution and Levy control?

"Please render your opinion on the above question."

I call your attention to Sections 1, 10, 15, 16 and 21 of Act No. 140, S. 46, approved July 7, 1927 (Local Acts, 1927, p. 54), which provide:

"Section 1. That there is hereby established an Inferior Court in Precincts 2 and 33 in Jefferson County, Alabama; said precincts lying within or partly within the City of Bessemer, Alabama, which shall be known and designated as the Municipal Court of Bessemer, which shall be in lieu of all justices of the peace within said precincts, and in lieu of all inferior courts heretofore created in lieu of justices of the peace in said precincts. Said court shall be held in a place furnished and designated by the Board of Revenue of Jefferson County as the place for holding same. **The said court shall have all the powers and jurisdiction now conferred or that may hereafter be conferred by law on justices of the peace, and the judge of said court shall have and exercise all the power and authority, perform all the duties now prescribed, or that may hereafter be prescribed by law for justices of the peace, and shall have all the power and authority over the matters transacted in said court.**" (Emphasis supplied)

"Section 10. That the owner of any judgment or decree for fifty dollars or over, rendered by this court, may file the same in the office of the Judge of Probate under the same procedure and in the same manner as now provided or which may hereafter be provided for filing judgments of courts of record, which judgments, when so filed and registered, shall be a lien upon all the property of the defendant when registered, which is subject to levy and sale under execution; **such lien shall continue for six years from the date of the registration, the registration of the judgment or decree shall be notice to all persons of the existence of a lien.**" (Emphasis supplied)

"Section 15. It shall be the duty of the clerk of said court to issue an execution on all judgments rendered in said court after five days from the entry thereof, and place the same in the hands of the constable or sheriff who shall return said process within thirty days thereafter, said return to show that he has collected said judgment, and has paid the same or the amount collected, or is unable to find property of the person against whom said process issued, out of which said execution can be satisfied in whole or in part. **Provided, however, that when a writ of garnishment has been issued on a judgment rendered by said court it shall not be necessary for the clerk to issue an execution thereon, but such writ of garnishment shall have the same effect as if an execution**

had been issued and said judgment shall remain in effect and process issue on said judgment in the same manner as if the said execution had been issued." (Emphasis supplied)

"Section 16. That if it shall appear to the auditor that in any case in said court where an execution has been returned unsatisfied, as to the costs of said cause, and in the opinion of the auditor said costs can be collected by an alias execution, the auditor may direct the clerk, to issue such alias execution, and may direct the constable or sheriff as to what property can be levied upon to satisfy said judgment."

"Section 21. That the court hereby created shall have and exercise concurrent jurisdiction with justices of the peace of the county as to all civil cases over which such justices have or may have as provided by law."

An examination of Act No. 140, supra, fails to disclose any provision for the issuance of alias executions without a revival of judgment. Therefore, I call your attention to the law pertaining to the issuance of alias executions out of a justice of the peace court:

"Section 8749. Issue of alias executions without revival.—When an execution has been issued within six months after the rendition of judgment, and has not been returned satisfied, another execution may be issued thereon at any time within three years thereafter, without a revival of the judgment."

Section 7862 of the Code of Alabama, 1923, governs the issuance of executions out of the circuit court and provides:

"Execution issued and returned not satisfied; others may issue for ten years.—When execution has been issued on a judgment and has not been returned satisfied, other executions may be issued at any time within ten years after the rendition of the judgment, without a revival of the judgment."

A consideration of the above quoted sections of the Act and the two sections of the Code, supra, convinces me that the provisions of Section 15 of Act No. 140, supra, in regard to a garnishment, merely takes the place of an execution in keeping the judgment from becoming dormant, and this is the only legal effect which it could have on the statutes pertaining to execution and levy. By issuing a writ of garnishment the judgment is kept alive, but this does not mean that a writ of garnishment takes the place of an execution, and if it becomes necessary to satisfy the judgment for costs an execution should be issued.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 16, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Officers—Offices—County Board of Education—U. S. Marshal—
County Superintendent of Education—Liability on Bond—

1. Member of County Board of Education cannot legally also hold office as United States Marshal.

2. Acceptance by such member of office as United States Marshal operates ipso facto as resignation or vacation of tenure of office as member of Board of Education.

3. Member of County Board of Education holds an office of profit under the State.

4. United States Marshal holds an office of profit under the United States.

5. County Superintendent of Education liable on bond for all illegal payments of public school funds to member of County Board of Education after acceptance of another office of profit.

School Code of Alabama, 1927, Sections 92, 94, 147, 150, 177;
Constitution of 1901, Section 280.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of April 19, 1940, in which you request my opinion as follows:

"Please refer to your ruling on Page 12, Biennial Report for 1928-30, and to your ruling on Page 35, Quarterly Report, Vol. 16, and advise me in answer to the following:

"1. Is it in violation of Section 280 of the Constitution of Alabama of 1901 for a member of the Jefferson County Board of Education to hold, at the same time, the office of United States Marshal?

"2. If your answer to the above is in the affirmative, and should the person who is at the same time a member of the Jefferson County Board of Education and United States Marshal elect to give up his membership on the Board of Education, would not the County Superintendent of Education be liable on his official bond for any and all amounts paid to him during the period he held both positions?"

This office has consistently held that a member of a county board of education holds an office of profit within the meaning of Section 280 of the Constitution of 1901, and may not, therefore, also hold another office of profit under this State or the United States. Opinion to Hon. H. E. Williams, Superintendent of Education, Lauderdale County, under date of December 29, 1934 (Biennial Report of Attorney General, 1934-1936, page 41); Opinion to Hon. B. P. Singleton, Chief Examiner of Accounts, under date of July 12, 1939 (Quarterly Report of Attorney General, Vol. XVI, page 35); Opinion to Mr. Powell T. Darnell, Shelby County, under date of October 4, 1928 (Biennial Report of Attorney General, 1928-30, page 12); Opinion to Mrs. R. L. Faucett, County Superintendent of Schools, under date of February 6, 1920 (Biennial Report of Attorney General, 1918-20, page 444).

It is equally clear that the office of U. S. Marshal is an office of profit within said Section 280, under the authorities collected in the opinion rendered March 14, 1940, to Hon. F. E. St. John, Chairman, Democratic Executive Committee, Cullman County (Quarterly Report of Attorney General, Vol. XVIII, page 316). Such officer has a fixed term of office, a salary or compensation fixed by law, and exercises in part and to a limited extent the sovereign power of the Federal Government. 28 U. S. C. A., Secs. 490, 504; *In re Neagle*, 39 Fed. 833, 135 U. S. 1, 34 L. ed. 55; *Agnello v. U. S.*, 290 Fed. 671, 269 U. S. 20, 70 L. ed. 145; *U. S. v. Colebrook*, 52 Fed. (2d) 307.

Answering your first inquiry, therefore, I am of the opinion that it is "in violation of Section 280 of the Constitution of Alabama of 1901 for a member of the Jefferson County Board of Education to hold, at the same time, the office of United States Marshal."

With reference to your second inquiry, it is to be noted that acceptance of an office of profit within the meaning of said Section 280 by a person already holding another office of profit within the field of operation of said section, operates ipso facto as a resignation or vacation of the office first held. Mechem, *Public Officers* (1890), Secs. 421, 425; Throop, *Public Officers*, Sec. 31; *Mann v. Darden, et al.*, 171 Ala. 142, 54 So. 504; *State ex rel. Camp v. Herzberg*, 224 Ala. 636, 141 So. 553; 29 Cyc. 1382, Note 81.

In the Herzberg case, it was observed that:

"In line with the weight of authority generally, this court has declared that statutory and constitutional provisions forbidding the holding of two offices at the same time do not render the holder of one office ineligible to election or appointment to another nor, prevent him from lawfully qualifying and entering upon the duties of the latter office; that the entering upon the duties of the latter, ipso facto, vacates the former office. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57; *Mann v. Darden*, 171 Ala. 143, 54 So. 504; note to *Attorney General v. Oakman*, 86 Am. St. Rep. 582."

This leaves for consideration the question whether upon acceptance of office as United States Marshal, such member of the County of Education could continue to hold office and receive compensation as a member of the Board. The answer is obvious that, if acceptance of the one office automatically terminated tenure of the other office, such compensation could no longer be legally paid, except upon the theory that he was thereafter a de facto officer. (46 C. J. 1053).

Section 2583 of the Code of 1923 is as follows:

"2583. Acts of de facto officer valid.—The official acts of any person in possession of a public office, and exercising the functions thereof, shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold office or not, and whether such person be lawfully qualified or not; but such person shall be liable to all penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right, or without being qualified according to law." (Emphasis supplied)

The law as to compensation of de facto officers, supported by numerous citations, has been thus stated:

"Right to Compensation or Other Emolument. Since the collection of the salary annexed to the office is an incident to the title, a de facto officer has no legal right to the emoluments of the office. It has, however, been held that an actual incumbent of a public office who is an officer de facto is entitled to the compensation attached to the office, where there is no adverse contestant or de jure officer, and he has acted in good faith with prima facie evidence of a right to perform the duties. The general principle that the salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise, is subject to the legislative power of a state to establish a different rule. * * * " 46 C. J. 1059, Sec. 377.

I find no statutory provision in Alabama as to the payment of such compensation. The italicized portion of Code Section 2583, *supra*, would seem to indicate that such compensation, prima facie, was not payable to a de facto officer. The first part of said Section as to the validity of the official acts of such officers is merely declaratory of the common law. 46 *Corpus Juris* 1060, Section 378.

"Validity of Acts. The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party. * * *"

Conner v. State, 212 Ala. 360, 102 So. 809; *Cary v. State*, 76 Ala. 78.

This is aside from the question of compensation, however, and in my opinion has no bearing on that question.

It is suggested that *Cooper v. Hawkins*, 234 Ala. 636, 176 So. 329, is authority for the proposition that compensation must be paid such officer, but I am unable to concur in that contention.

The facts of that case were peculiar. Cooper sued Hawkins for money had and received by him while holding office under an act of the Legislature subsequently declared unconstitutional. Cooper held the office, de jure originally, and was ousted therefrom by a writ of quo warranto by Hawkins,

the judgment of ouster being affirmed by the Supreme Court, which court refused to pass on the alleged ground of unconstitutionality not raised in the court below. Thereupon Hawkins was installed in office under the authority of the ouster judgment, and continued to hold the office and draw the salary attached thereto, until the question of constitutionality, which the Supreme Court had refused to consider in the earlier proceeding, was properly raised and passed on in a new proceeding, wherein the court declared the act void on said constitutional ground.

The basis of the decision was thus expressly stated:

"The controlling factor in the case now before us is that Mr. Hawkins entered into the office, performed the duties thereof, and received the salary now in question upon a conclusive adjudication of his right to the office. All other questions may be laid aside. The judgment of the trial court was in accord with these views and is due to be affirmed. It is not material whether that court or counsel for appellee reached the correct conclusion on like reasoning."

Cooper v. Hawkins, supra, 639.

Recurring to the statute, Code of 1923, Section 2583, supra, the question is as to the meaning of construction to be accorded the words:

"but such person shall be liable to all penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right, or without being qualified according to law."

It can hardly be contended that there is no field of operation for this language, that it is a mere idle gesture.

We have seen that the first part of the statute is declaratory of the common law.

The latter portion of the statute, being in *pari materia* with the former position, and being of broad and comprehensive meaning, is, it is submitted, also declaratory of the common law as stated in the numerous decisions cited in 46 **Corpus Juris** at pages 1059-60 (notes 70, 71), to the effect that compensation is not ordinarily payable to a *de facto* officer.

The exception to the rule cited in note 71, supra, that it may be payable, "where there is no adverse contestant, or *de jure* officer, and he has acted in good faith with *prima facie* evidence of a right to perform the duties," does not seem to apply to the situation now being considered.

Can it be said that a person holding an office of profit under the State and accepting another office of profit under the United States, in violation of the Constitution and statutes of Alabama (Code of 1923, Sec. 2575, subsection 7), is acting in good faith, or that there exists any "*prima facie* evidence of a right to perform the duties."

In **Cooper v. Hawkins**, supra, the *de facto* officer, while holding the office and receiving the salary attached thereto, held under an act of the Legislature, presumed to be valid, the constitutionality of which had not been proper-

ly questioned. Further, he only entered upon the duties of the office after a decision of the Supreme Court sustaining his right thereto. There could be no question as to good faith or prima facie evidence of right thereto. Until the ultimate decision of the court voiding the act under which he held, he was to all intents and purposes an officer *de jure*.

No such features exist in the matter now considered. We have seen that our courts have repeatedly held that the acceptance of one office of profit automatically and ipso facto operates as a vacation or resignation of the other office previously held. Cases, *supra*. The holding of both officer of profit was in defiance of both constitution and statute and the holder was not entitled to receive compensation for services growing out of the abandoned office. The incumbent's ignorance,—if there be such, and which does not appear,—was no excuse. He was presumed to know the law—at any rate so elemental and fundamental a principle of law. *Ignorantia legis nominem excusat*. Biennial Report of Attorney General, 1930-32, page 114; Biennial Report of Attorney General, 1928-30, page 105.

In an opinion of the Attorney General dated July 12, 1933, to Hon. A. F. Harman, State Superintendent of Education, Biennial Report of Attorney General, 1932-34, page 284, it was ruled on the authority of a prior opinion dated March 23, 1931, to Hon. B. Cooper, County Treasurer, Marion County Biennial Report of Attorney General, 1930-32, page 179, that the County Treasurer of School Funds was liable for the payment of illegal or unauthorized expenditures of school funds.

Section 94 of the School Code of Alabama of 1927 imposes upon the County Treasurer of School Funds (now Custodian of County School Funds) the duty to receive and, upon the order of the County Board of Education, through the County Superintendent of Education, to be approved by the Chairman of the County Board of Education in writing, to disburse county public school funds.

Section 92 of said Code authorizes payment of compensation and expenses to members of the County Board of Education out of county public school funds.

Section 147 of said Code requires the County Superintendent of Education to make bond "conditioned upon the faithful performance of the duties of his office" and Section 298 of said Code requires the County Treasurer of School Funds also to make bond, but does not prescribe the condition thereof.

The remaining question whether the County Superintendent of Education is liable on his official bond for any and all amounts paid to the member of the board after acceptance by him of the office of United States Marshal, must, in my opinion, be answered affirmatively.

Under the School Code of 1927, the Superintendent, as the chief executive officer of the board, "shall see that the laws relating to the schools and the rules and regulations of the state and county boards are carried into effect" (Sec. 150). He must prepare pay rolls for payment of teachers and employees and all other items authorized by the county board (Secs. 171-2). He must file with the county treasurer of school funds a certificate showing the amount estimated to be required to meet pay rolls (Sec. 173).

And finally, Section 177 of said Code requires that:

"177. Approval of Pay Roll.—No money shall be paid on any pay roll unless the County Superintendent of Education certifies thereto in writing that the same in every respect is correct and that the amounts contained thereon are due the parties as shown thereby and that the same should be paid, and unless the chairman of the County Board of Education endorses on said pay roll an order that the same be paid."

The foregoing provisions, in my opinion, impose on the Superintendent the **duty of investigating** each and every payment to be made out of school funds including, of course, payment of compensation to members of the Board (Section 92), to determine the legality vel non of such payments or claims, at his peril. An approval for payment of an illegal or unauthorized claim or demand is unquestionably a breach of the official bond of the Superintendent, "conditioned upon the faithful performance of the duties of his office," (Section 147).

This is the inevitable result of the authorities and the opinions of this office as to approval for payment out of public funds of unauthorized or illegal claims. **Mobile County v. Williams, Judge**, 180 Ala. 639, 647, 61 So. 963; **Biennial Report of Attorney General**, 1928-30, page 539; **Ramage, Parks & Co. v. Folmar, County Treasurer**, 219 Ala. 142, 146, 121 So. 504; **Biennial Report of Attorney General**, 1930-32, page 239; **Biennial Report of Attorney General**, 1934-36, page 156.

If it be urged that the opinions and authorities, supra, the liability should be conditioned upon notice or knowledge of the superintendent as to the illegality of the claim certified by him for payment out of school funds, it is in my, sufficient answer to observe that the duty to investigate is by necessary implication imposed upon him by the requirement that he must certify that each claim "in every respect is correct" etc. (School Code, 1927, Sec. 177).

The word "certify" is defined as: (1) "To give certain information of; to make certain as to a fact; to attest authoritatively; to verify; (2) to testify to in writing; to make a declaration concerning, in writing, under hand, or hand and seal; (3) to give written information to, to assure, make certain; and (4) to endorse authoritatively as being of the standards * * * represented or required." Webster's **International Dictionary** (2d Ed.), Unabridged.

So, in **Etzold v. Board of Commissioners**, 146 N. E. 842, 82 Ind. App. 655, it was held that the provision in a statute requiring a court reporter's compensation to be "certified, audited and paid," requires the exercise of judicial discretion to allow or reject. And in **Kay v. Jones**, 30 Ky. 38, it was said that the expression "certify" should be construed as meaning everything which prior provisions required to be done.

In my opinion, in other words, the requirement in the School Code that the Superintendent shall certify as to the correctness of the pay roll necessarily imposes upon him the duty to investigate as to each and every item so certified for payment; and failure to investigate, resulting in an improper certification, necessarily constitutes a breach of his official bond for which he is liable.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 17, 1940.

Hon. W. C. Bragg,
County Treasurer,
Fayette County,
Fayette, Alabama.

Tax Sales—Redemption—

1. Order of judge of probate is county treasurer's authority for paying to purchaser of land sold for taxes the money previously paid to him on redemption of such lands.

2. Procedure for judge of probate to follow, in case certificate of purchase has been lost or destroyed, outlined.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 25, 1940, in which you request my opinion as follows:

"Section 3116 of the Code provides for the redemption of land sold for taxes which provides for payment of the money by the County Treasurer to the purchaser on Certificate of the Probate Judge and the return of the Certificate of sale.

"Please advise me what is the proper procedure in paying the money over to the purchaser when the certificate of purchase has been lost."

Section 3116 of the Code of Alabama, 1923, to which you refer in your inquiry, has been incorporated into the Revenue Act of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256 at page 372), as Section 275 thereof. This section reads as follows:

"Section 275. If the lands redeemed were bid in by any person other than the State, the redemption money must be deposited by the judge of probate in the county treasury, and there kept separate and apart from the general funds of the county, and the judge of probate shall notify the purchaser of such deposit by mailing notice to the residence or place of business of such purchaser, or to such address as the purchaser may furnish the judge of probate at the time he secures his certificate of purchase; and upon the demand of the purchaser, his legal representative or assignee, and the surrender of the certificate of purchase, the judge of probate must give him an order on the treasury for the same." (Emphasis supplied)

From this section it appears that the authority of the county treasurer to pay out this money is the order of the probate judge. In other words, it is not the duty of the county treasurer to secure the certificate of sale prior to the payment of this money, but only to secure the order of the probate judge.

In regard to that part of your inquiry concerning the proper procedure where the certificate of purchase has been lost, I refer you to an opinion to Hon. E. A. Hammett, Judge of Probate, Talladega County, under date of March 19, 1937, Quarterly Report of Attorney General, Vol. VI, page 164, which, in dealing with the surrender of the certificate of purchase in executing a tax deed, stated:

"This statute should be strictly construed. I might state parenthetically that the deed may be delivered at the expiration of two years where the sale was made before April 19, 1933. Quarterly Report, Attorney General, Vol. 2, page 107.

"I think you should require a surrender of the certificate before making the deed for the reason that you have no definite assurance that the certificate of purchase was not transferred by the original purchaser. If the certificate of purchase has been established in a procedure of Court which would be lawfully binding on you, then in that instance you could probably act, but until proper procedure has been taken, I can only advise you to insist upon surrender of the certificate of purchase before you make a tax deed."

It is my opinion that the procedure outlined above is peculiarly applicable to your inquiry. However, if the probate judge is willing to assume the responsibility of issuing an order without surrender of the certificate of purchase, in my opinion he may, upon the purchaser giving an indemnifying bond, issue the order to the county treasurer. Cf. Opinion of this office rendered to Hon. J. H. Hard, Jr., State Comptroller, under date of July 5, 1934, Office Edition, Vol. 18, page 36.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 17, 1940.

Hon. Walter B. Jones,
Director, Dept. of Conservation,
Montgomery, Alabama.

Director of Conservation—School Funds—Act No. 409, H. 720, approved September 10, 1915 (Local Acts, 1915, p. 313) repealed by Act No. 581, H. 851, approved September 22, 1939 (General Acts, 1939, p. 949, Pamphlet).

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion bearing date of April 4, 1940, which follows:

"By virtue of a local act as found in the Local Laws of Alabama, 1915, No. 409—H.—720—John, Felix M. Vines appointed Trustee of Section 16, Township 17 South, Range 5 West, Jefferson County, Ala. This condition has existed for years in Jefferson County, and the Department of Education has had quite a bit of trouble with this annual arrangement.

"Under the School Land bill of 1939 (No. 581—H. 851—Domineck), the supervision and management of all State School lands was placed with the Department of Conservation and all laws or parts of laws, whether general, local or special, in conflict with the provisions of this Act were expressly repealed.

"Under the Constitution of Alabama, Articles 257-260, inclusive, all revenue derived from 16th Section lands are placed in the State Treasury as a trust fund which fund shall bear interest and the principal of which cannot be expended.

"Will you kindly render us your opinion as to the status of this trusteeship, more particularly advising whether or not the local law is constitutional and, if so, whether it is repealed by the express terms of the School Land law of 1939 above cited."

Under the authority of Act No. 409, H. 720, approved September 10, 1915, (Local Acts, 1915, p. 313) as amended (amendment not here material) the Hon. Felix M. Vines was appointed trustee of the school lands situated in Jefferson County, Alabama, (Section 16, Township 17 South, Range 5 West) and has for many years managed and supervised the same. This now presents the question propounded by you, that is, whether or not the said Local Act was repealed by Act No. 581, H. 851, approved September 22, 1939 (General Acts, 1939, p. 949, pamphlet).

In answer to this question I first call attention to Section 1 of Act No. 581, supra, which is as follows:

"Section 1. The Director of Conservation is hereby expressly authorized and empowered to have complete management of, and supervision over, lands which are known as school lands, as defined by Section 629 of the 1927 Alabama School Code; which lands are vested in or which may hereafter be vested in, the State of Alabama in trust for the use of schools."

Also Section 23 of Act No. 581, supra, provides:

"Section 23. All laws or parts of laws, whether general, local or special in conflict with any of the provisions of this Act are hereby expressly repealed."

From a reading of the above quoted sections, it is my opinion that the Legislature expressed its intention in enacting Act No. 581, supra, to vest in a single office, that of the Director of Conservation of the State of Alabama, the complete management and supervision of all school lands as defined by Section 629 of the School Code of 1927, which includes sixteenth section lands, throughout the State, and in an effort to carry out this purpose, all laws or parts of laws, whether general, local or special, which were in con-

flict therewith were repealed. Where the intention of the Legislature is so clearly expressed, it must be presumed that the Local Act for Jefferson County above referred to was repealed by Act No. 581, supra. In support of this conclusion attention is called to the case of *Shepherd et al v. Clements*, 224 Ala. 1, 141 So. 255, where Justice Gardner speaking for the Court said:

"We recognize the rule that the presumption is a general act does not repeal a local statute, but, as has been well said, 'such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of intention which may be made to appear by the subject-matter with which the general act is concerned, by the surrounding circumstances, by other legislation on the same subject, and the purpose to be accomplished. Thus, where the clear general intent of the legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed. 36 Cyc. 1089, 1090.

"As applicable to the present question, another rule of construction should not be ignored, and that is that statutes should have a rational, sensible construction, if their meaning is at all doubtful. 25 R. C. L. p. 1018."

It is, therefore, my opinion that Act. No. 409, supra, was repealed by Act No. 581, supra, and that the complete management and supervision of the school lands in Jefferson County, Alabama, is now vested in the Director of Conservation of the State of Alabama.

The foregoing conclusion precludes the necessity of passing upon the constitutionality of Act No. 409, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 17, 1940.

Hon. H. M. Touart,
Tax Assessor, Mobile County,
Mobile, Alabama.

Taxation—

Personal property located in a certain county on October 1st is assessable in that county and cannot be later assessed for that tax year in another county although said property is removed soon after October 1st to said other county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 9, 1940, in which you request my opinion as follows:

"I should appreciate an official opinion from you covering the following facts:

"To the best of my knowledge a construction concern which has been engaged in extensive operations in Mobile County, brought into this county soon after the first of October, 1939, a large amount of engineering equipment, which is still here. Before the end of the assessing period I called upon these people and requested that they make a return of the aforesaid personal property, but they failed to do so.

"After the assessing period had closed, I proceeded to escape this property, was deterred from doing so by information received from the said concern to the effect that the property had been assessed in another county. I wrote to the assessor of this county and received a reply, stating that the property was in that county on October 1st, 1939, and that his county was entitled to the assessment.

"Later I requested a certified copy of the assessment, and find that it was an unsigned assessment dated February 27th, 1940.

"Under the facts stated, who is entitled to assess the property in question, I, or the assessor of the other county?"

I wish to advise that it is my opinion that the Tax Assessor of the county in which the property herein concerned was located on the first day of October, 1939, and in which county an information assessment was made under date of February 27, 1940, has properly assessed the said property.

It is my judgment that the property became subject to the tax lien as of the first day of October, 1939, at which time the property was located in the county in which the information assessment under date of February 27, 1940, was made. The fact that this property was removed soon after the tax lien attached cannot, in my judgment, affect the duty of the Tax Assessor in the county where the tax lien first attached, to assess the same, upon the failure of the owners thereof to assess the said property for taxation during the period prescribed by law for such assessment. I wish to refer you to Sections 30 and 44 of Act No. 194, H. 324, approved July 10, 1935, General Acts of 1935, page 256, which provides in part as follows:

"Section 30. Between the first day of October and the first day of January of each year, the Tax Assessor shall in all counties having a population of one hundred thousand or less, visit each voting place in each precinct for the purpose of listing property for taxation, and he shall remain there one day in all county precincts and towns of less than one thousand inhabitants, from eight o'clock A. M. until four o'clock P. M. In towns other than county seats, of five thousand inhabitants or more, he shall remain at each place of appointment for one week, either by himself or deputy."

"Section 44. Having failed to procure on verbal or written demand from any delinquent his list of taxable property on or before the third Monday in January, the Assessor shall ascertain from inquiry or otherwise the property and other subjects of taxation upon which such person is liable to be taxed, and shall list and make return thereof upon the proper blank and note upon such returns the failure of the owner after

notice to make such return and the accrual of a penalty of ten per cent of the taxes to be assessed thereon."

You will note from the above quoted provisions that the duty is imposed upon the Tax Assessor to assess all property in his county as of October 1, unless the owner thereof voluntarily returns the same for taxation during the period prescribed by law for such assessment. In my judgment, the fact that soon after October 1, the property was removed from the county in which it was located at the time the tax lien attached, namely, October 1, cannot affect the right of the Tax Assessor of the county in which the property was located when the tax lien first attached, to assess the same on information when the period for voluntary assessment on the part of the owner has expired under the existing provisions of law.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 20, 1940.

Hon. John D. Petree, Director,
Department of Industrial Relations,
State of Alabama,
Montgomery, Alabama.

Workmen's Compensation Act—Code of Alabama, 1923, Section 7751(c), as amended—

Compensation statutes should be liberally construed, in favor of the injured employee.

Loss of substantial portion of second phalange entitles injured employee to compensation for the loss of entire finger.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of April 5, 1940, in which you request my opinion as follows:

"Award for 'substantial' portion of middle phalange of any digit; Section 7751 (C), Workmen's Compensation Act.

"The Workmen's Compensation Unit at the present writing has two requests from insurance adjusters, having analogous cases pending settlement, for an opinion as to what compensation is due when an employee has suffered traumatic amputation of the distal and major or minor portions of the middle phalange at the same time.

"Replies to such inquiries in the past have referred those interested to the 1922 decision of the Supreme Court of Alabama in the case of *Ex parte Puritan Baking Co.* (208 Ala. 373) (94 So. 347), wherein it was held that the loss of a 'substantial' portion of the middle phalange entitled the injured to compensation for the entire digit. However, in the cited case ankylosis (permanent stiffness) had developed in the joint between the proximal and middle phalanges, thus simplifying the case at issue.

"Sec. 7551 (C) of the Act is quite specific in providing awards for the loss of one phalange and **two or more** phalanges, but the law is silent with respect to what benefits shall be paid when one phalange and a fractional part of the second (middle) have been amputated.

"We will therefore appreciate greatly the benefit of your official opinion as to what benefits are correctly payable where the second and, say, fifty per cent, or more, of the second joint have been amputated, but **no** ankylosis develops in the knuckle joint.

"We will appreciate your opinion as to what percentage of the middle phalange of a digit should be regarded as a 'substantial' portion of such middle phalange, whether or not there may be resultant stiffening of the middle joint.

"Requests for unofficial opinions involving this point are constantly being received by the Workmen's Compensation Unit from adjusters and self-insured employers who do not wish to take such cases to the circuit courts for adjudication. It is important that some clear-cut ruling be secured, as the question could involve, in the case of a thumb, as much as 30 weeks benefits at the weekly maximum rate of \$18.00, or \$540.00, a serious matter to an injured worker. Incidentally, the Unit in answering such inquiries has without fail called attention to the fact that the Supreme Court has repeatedly held that the Workmen's Compensation Law, being inherently remedial in its objectives, is to be liberally construed in favor of the injured worker. For your information 928 cases involving loss of fingers and finger joints were reported to the Unit in 1938."

I call your attention to Subsection (c) of Section 2 of Act No. 29, S. 49, approved March 17, 1936 (General Acts, 1936, page 9), Section 7551 of Michie's 1936 Supplement to the Code of 1928, which provides in pertinent part as follows:

"(c) * * * For the loss of a thumb, sixty weeks. For the loss of a first finger, commonly called index finger, forty-five weeks. For the loss of a second finger, thirty weeks. For the loss of a third finger, twenty weeks. For the loss of a fourth finger, commonly called little finger, fifteen weeks. **The loss of the first phalange of the thumb, or of any finger, shall be considered as equal to the loss of one-half of such thumb, or finger, and compensation shall be paid at the prescribed rate during one-half of the time specified above for such thumb or finger. The loss of two or more phalanges shall be considered as the loss of the entire finger or thumb; but in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand** * * * **In all cases the permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member, but in**

such cases the compensation in and by said schedule shall be in lieu of all other compensation." (Emphasis supplied)

Compensation statutes should be liberally construed favorably to an injured employee. **Spratt v. Crowell**, 4 Fed. Supplement, 368; **Ex parte Majestic Coal Company**, 208 Ala. 86, 93 So. 728; **National Cast Iron Pipe Co. v. Higgenbotham**, 216 Ala. 129, 112 So. 734.

In Workmen's Compensation cases, the higher element or measure of damages should be accorded to the injured person, in view of the purpose of the Workmen's Compensation Act to accord adequate compensation. **Lisowsky v. White**, 9 Atl. (2d) 599 (Maryland).

The trial judge's definition of the term, "loss of the use" of Workmen's Compensation claimant's arm, as meaning that it was so affected as substantially and materially to impair its use in practicable performance of its functions in pursuit of labor was substantially correct. **Traders and General Insurance Company v. Porter**, 124 S. W. (2d) 900, (Texas).

Amputation of finger through head of second phalange including one-sixteenth to one-fourth inch of bone, entitled employee to compensation for loss of entire finger. **Starceovich v. Central Iowa Fuel Company**, 208 Iowa 790, 226 N. W. 138; **Brugioni v. Sayceor Coal Company**, 198 Iowa 135, 191 N. W. 470.

Where an injury to the eye caused the loss of the lens and hence of binocular vision but did not reduce vision of the eye to one-tenth or less of normal vision with glasses, held that the injury was compensable under portion of General Statutes 1918, Section 5352, as amended, providing for loss of substantial part of member. **Gigleo v. Dorfman and Kimavisky**, 106 Conn. 401, 138 Atl. 448, 451.

"'Substantial' means belonging to substance; actually existing; not seeming or imaginary; not illusive; real, solid, true; veritable." **Elder v. State**, 162 Ala. 41, 50 So. 370, 374.

In the case of **Ex parte Puritan Baking Company**, 208 Ala. 373, 94 So. 347, Mr. Justice Gardner, speaking for the court, held that the loss of one phalange of a finger and a substantial portion of another phalange entitled the injured employee to compensation for the entire finger:

"The foregoing authorities are from the intermediate appellate courts of New York, and not from the court of last resort, and counsel for respondent earnestly insists that they are in conflict with the decision of the Court of Appeals of New York in the case of *In re Petrie*, 215 N. Y. 335, 109 N. E. 549, reviewing the holding of the Supreme Court of that state in the same case (165 App. Div. 561, 151 N. Y. Supp. 307). In the latter case the Supreme Court held there had been a substantial and permanent injury to the first phalange which involved the removal of a portion of the bone, and interfered with the use of the finger in a material way, and the injury was, in law, a loss of the first phalange, and therefore a loss of one-half of the finger. The finding of the commissioner, so far as the amputation was concerned, was to the effect that one-third of the bone of the distal phalange was cut off. The Court of Appeals upon reviewing the case pointed out some additional findings of fact as to the extent of the injury, and that in some respects these

findings were contradictory and unsatisfactory. Construing all the findings together, however, the court concluded that 'substantially all the phalange was cut off,' and therefore plaintiff was entitled to compensation as if he had lost the entire phalange. In discussing the purposes of the Workmen's Compensation Act, and in concluding that it should be liberally construed, the court said:

"The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the Legislature as a wise public policy concerning injured employes. Under such circumstances, we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish.'

"In this connection it may be noted that the overwhelming weight of authority is to the effect that the Workmen's Compensation acts should be given broad and liberal construction in order to effectuate their evident intent and purpose. Corpus Juris, Workmen's Compensation Acts, Supp. Sec. 34; 28 R. C. L. 755. * * *

"In *Pater v. Superior Steel Co.*, 263 Pa. 244, 106 Atl. 202, it was held by the Supreme Court of Pennsylvania that the loss of the use of an arm with or without amputation, resulting from injuries sustained by a workman, should be the equivalent of the actual loss of the arm. See also *Payne v. Industrial Comm.*, 296 Ill. 223, 129 N. E. 830. * * *

"A substantial portion of the second phalanges of these fingers has been removed, and as a result of this accident the second joints have become to stiffened as to all practical purposes destroy the usefulness of the second phalanges. Such is our interpretation of the finding of the lower court. So construed, we are clear to the view that the award of compensation was justified as upon the loss of both phalanges, therefore entitling the plaintiff to compensation as for the loss of the entire finger under the provisions of our statutes. The Workmen's Compensation Act was intended as a simple and speedy remedy by way of compensation to the employe. It was intended for practical purposes, and for a practical administration, and to compensate the employee for the loss he has sustained by the injury received. **It must follow, therefore, that if there had been an amputation of a substantial portion of a phalange resulting in the stiffening of the joint so as, for all practical purposes, to destroy the use of that phalange to the workman, then, within the meaning of the statute, he has lost the same, and compensation should be awarded accordingly.**" (Emphasis supplied)

In the case of *Ex parte Puritan Baking Company*, supra, the facts disclose that less than one-half of the second phalange was removed.

The premises considered, and on authority of the cases cited herein, I am of the opinion that a loss of fifty per cent of the second phalange is equiva-

lent to the loss of the second phalange, and the injured employee would be entitled to compensation for the loss of the entire finger, regardless of whether or not ankylosis developed.

This office declines to answer as to what percentage of the phalange should be regarded as a "substantial" portion of such phalange, as each particular case must be determined on its own facts and must also depend upon whether or not the use of the second phalange has been destroyed or impaired to such an extent as to be useless to the injured employee in his work. A fractional portion of the second phalange might be amputated and yet the use of the second phalange may be so impaired as to be useless to the injured employee in his work. Your Department may safely rely on the decision in the Puritan Baking Company case, supra, in determining these matters, bearing in mind that the Workmen's Compensation Act should be given a broad and liberal construction in order to effectuate its purpose.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 21, 1940.

Hon. A. H. Collins,
State Superintendent of Education,
Capitol.

Schools—County Board of Education—

County Board of Education is authorized to expend public school funds for school purposes in improving state-owned school lands and property under its supervision and control.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of April 24, 1940, in which you request my opinion as follows:

"I am informed that the Lauderdale County Board of Education has made an application to the Work Projects Administration for Federal Aid in the construction of a school building at Center Star and that the Crenshaw County Board of Education has made a similar application to the Works Projects Administration for Federal Aid in improving the school campus at Highland Home.

"These applications, it seems, have passed the State Administrator but are now being held up in Washington pending request for information as to whether or not the Lauderdale County Board of Education

and the Crenshaw County Board of Education have legal authority to perform the proposed work on State-owned properties. The records on file here indicate that the property at each of these schools is deeded to the State of Alabama.

"I am enclosing a copy of a letter from Mr. Frank A. March, Director of Project Control Division of the Work Projects Administration, Washington, D. C., directed to Mr. W. G. Henderson, State Work Projects Administrator, which is self-explanatory. You will note that the request for information in this letter is embodied in paragraph 3.

"I will thank you to answer this inquiry and kindly let me have your reply at your earliest convenience."

Paragraph 3 of the letter from Mr. Frank A. March above referred to reads as follows:

"It is requested that we be advised of the specific citations to the pertinent state statutes through which the County Board of Education of Crenshaw County are legally authorized to perform the proposed work on state-owned property."

Section 86 of the Alabama School Code of 1927 vests general administration and supervision "of the public schools of the educational interests of each county," with certain exceptions not pertinent, in the county board of education. See also Sections 8 and 98 of said School Code.

The nature, powers and authority of county boards of education have been declared in numerous decisions of the Supreme Court of Alabama. See **Kimmons v. Jefferson County Board of Education**, 204 Ala. 384, 85 So. 774; **Dean v. County Board of Education**, 210 Ala. 256, 97 So. 741; **State ex rel. King v. Board of Education of Russell County**, 214 Ala. 620, 108 So. 588; **Greeson Mfg. Co. v. County Board of Education**, 217 Ala. 565, 117 So. 163; **Turk v. Board of Education of Monroe County**, 222 Ala. 177, 131 So. 436.

In **State ex rel. King v. Board of Education of Russell County**, supra, at page 621, it is said:

"The general administration and supervision of the public schools and of the educational interests of each county (with exceptions not here necessary to specify) is vested in the county board of education (Sec. 77 School Code), and numerous provisions of our statutes disclose the very broad latitude of authority granted to such board. Such boards are vested with a very broad discretion. **Christian v. Jones**, 211 Ala. 161, 100 So. 99, 32 A. L. R. 1340." (Section 77 referred to is the forerunner of Section 86 of the Alabama School Code of 1927, supra.)

In **County Board of Education v. Slaughter**, 230 Ala. 229, 160 So. 758, it was said that a county board of education is a quasi-corporation and governmental agency created by law and endowed with certain rights and powers defined by statute, and that being a creature of the statute it can exercise only those powers which are expressly conferred upon it or are necessarily incident thereto. Its powers are analogous to those exercised by a county as a governmental agency of the State.

In *State v. Tuscaloosa County*, 233 Ala. 611, 172 So. 892, it was held that public school funds, as between county and state, are State funds, and that the county, through its governing body, has no interest in, nor control over, such funds.

In view of the above authorities, I am of opinion that a county board of education, being an independent agency of the State itself, entrusted with supervision and control of school property and funds for public school purposes, even though legal title to the school property be vested in the State itself, has power to use public school funds for the improvement of such property. This power, in my opinion, must be necessarily implied on account of the statutory delegation of power to the county board of education in all matters affecting the public schools of the county where supervision and control is not otherwise expressly vested.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 22, 1940.

Hon. R. T. Goodwyn, Jr.,
Clerk of the House of Representatives,
Capitol.

States—Officers—Legislature—Members of—

Members elected to fill vacancies may take oaths of office immediately after their election is certified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 12, 1940, in which you request my opinion as follows:

"There have been several Members of the Legislature elected since the last recess of the Legislature. As you know, the Legislature will meet as a Committee of the Whole before the next adjourned session.

"I would like to know if these Members can be sworn in and paid their per diem while the Legislature is sitting as a Committee of the Whole."

Section 46 of the Constitution of 1901 reads in pertinent part as follows:

"Senators and representatives shall be elected by the qualified electors on the first Tuesday after the first Monday in November, unless

the legislature shall change the time of holding elections, and in every fourth year thereafter. The terms of office of the senators and representatives shall commence on the day after the general election at which they are elected, and expire on the day after the general election held in the fourth year after their election, except as otherwise provided in this Constitution. * * * Whenever a vacancy shall occur in either house the governor shall issue a writ of election to fill such vacancy for the remainder of the term."

Sections 413, 414 and 416 of the Code of Alabama, 1923, provide for the election of members of the House of Representatives and Senators in a general election to be held "on the first Tuesday after the first Monday in November, 1910, and every fourth year thereafter."

Sections 510 and 511 of the Code of Alabama, 1923, as the latter section was amended by Act No. 334, H. 33, approved July 2, 1931 (General Acts, 1931, p. 392) provide for the canvassing of the returns of elections in the several counties of the State.

Section 525 of the Code of Alabama, 1923, provides as follows:

"Section 525. Certificate of votes delivered to probate judge of each county to be forwarded.—The board of supervisors must, as soon as they have ascertained the result of an election, make on planks furnished by the secretary of state certificates stating the exact number of votes cast in the county for each person voted for, and the office for which such person was voted for, and file the certificates with the judge of probate who must immediately forward such certificate as to all members of the legislature and to all civil officers who are to be commissioned by the governor, except the attorney-general, state auditor, secretary of state, state treasurer, superintendent of education and commissioner of agriculture and industries to the secretary of state."

Sections 512, 513 and 516 of the Code of Alabama, 1923, read, respectively, as follows:

"Section 512. Canvass of election returns by state officials.—All returns of elections required by law to be sent to the secretary of state must, within fifteen days after an election, be opened and counted in the presence of the governor, secretary of state and attorney-general, or two of them."

"Section 513. Governor proclaims result of election.—The governor must give notice by proclamation published in some newspaper at the seat of government of the result of the election as ascertained in the preceding section, except as to officers provided for in section 511 (421) and in the succeeding section."

"Section 516. Certificates of election to members of congress and legislators.—The secretary of state shall, within ten days after receiving the returns of election from the judge of probate of each county, furnish, from a count of the actual vote cast, as the same appears by the returns certified to him, certificates of election to members of the legislature and to members of congress."

Section 529 of the Code of Alabama, 1923, reads in pertinent part as follows:

"Section 529. Special elections; when and for what offices held.—Special elections are to be held in the following cases:

"1. When a vacancy occurs in the office of senator or representative in the legislature, when the legislature will be in session prior to the next general election for that office."

and Section 535 of the Code of Alabama, 1923, reads as follows:

"Section 535. How conducted and certificates given.—Special elections are to be held and conducted, the returns thereof made, and certificates given, and, unless otherwise expressly provided, regulated in all respects by the provisions in relation to general elections."

Thus, it can be seen that within fifteen days after any election called for the purpose of filling vacancies in the Legislature, either in the Senate or House of Representatives, the returns must be opened and counted in the presence of the Governor, Secretary of State and Attorney General, or two of them; the Governor must give notice by proclamation published in some newspaper at the seat of government of the result of the election; and the Secretary of State must, within ten days after receiving the returns of election from the Judge of Probate of each county, furnish, from a count of the actual vote cast as the same appears by the returns certified to him, certificates of election to the persons elected to membership in the Legislature.

The premises considered, it is my opinion that the term of office of persons elected to fill vacancies in the Legislature, either in the Senate or House of Representatives, begins immediately after the returns of the election are canvassed and the certificates of election are issued.

Section 279 of the Constitution of 1901, provides for the oath of office to be taken by members of the Legislature and other officers and reads as follows:

"Section 279. All members of the Legislature, and all officers, executive and judicial, before they enter upon the execution of the duties of their respective offices, shall take the following oath or affirmation:

"I, _____, solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

"The oath may be administered by the presiding officer of either house of the legislature, or by any officer authorized by law to administer an oath."

Section 2587 of the Code of Alabama, 1923, provides for the "duelling oath" to be taken by every public officer in addition to the constitutional oath.

Section 1520 of the Code of Alabama, 1923, reads as follows:

"Section 1520. Oath of office; by whom administered.—The oath of office may be administered to the members of the legislature by any judge of the supreme court, court of appeals, circuit, or probate court, or justice of the peace, or the president of the senate, or the speaker of the house of representatives; and the president of the senate and the speaker of the house of representatives may be sworn in by any member of their respective houses."

Thus, it can be seen that the constitution and statutes of this State, while prescribing the oaths which must be taken by members of the Legislature, and the officers who may administer such oaths must be taken or administered.

If a statute of this State did provide the time when such oaths should be taken or administered, it would be merely directory as to point of time. See 46 C. J. 960-61, Section 86; *Mechem on Public Offices and Officers*, Sections 265-266; *Throop on Public Officers*, Section 173 and the case of *State v. Callow*, 78 Mont. 308, 254 P. 187, and the authorities therein cited.

The premises considered, it is my opinion that persons elected to fill vacancies in the Legislature, either in the Senate or House of Representatives, may take the oaths of office prescribed by the constitution and statutes before any officer authorized to administer the same at any time after their election is declared and certified in the manner prescribed by the statutes hereinabove cited. That being true, it necessarily follows that such persons so elected to membership in the Legislature are just as much members of the Legislature as any of the other members thereof and are entitled to the same compensation, etc. as are the other members of the Legislature.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

States—Travel Expense—Alabama Boxing and Wrestling Commission—

Chairman, Associate Members and Recorder of Permits and Licenses of the Alabama Boxing and Wrestling Commission held

held entitled to receive five cents per mile as transportation expense when using private automobiles on State's official business. When using public conveyances, actual cost of transportation held payable.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 11, 1940, in which you request my opinion as follows:

"Please refer to Act 489, Senate Bill 303, Page 703, General Acts of 1939, and particularly to Sections 5, 7 and 8, and advise me in answer to the following questions?

"1. Can the Chairman and Associate Members of the Alabama Boxing and Wrestling Commission legally be paid mileage at the rate of five (5c) cents per mile, in view of the wording, 'actual expenses,' used in the above Act?

"2. Can the Recorder of Permits and Licenses of the Alabama Boxing and Wrestling Commission legally be paid mileage at the rate of five (5c) cents per mile, in view of the wording, 'actual expenses,' used in the above act?

"3. If your answer to either of the above questions is in the negative, would not the Chairman, and Associate Members, or the Recorder of Permits and Licenses have to present receipts for such oil and gasoline as may have been used on a trip for the Commission and be reimbursed in this manner, instead of any fixed allowance?"

In my opinion, your questions numbered one and two must be answered in the affirmative, and by such answer the necessity of a reply to your third question is precluded.

I call your attention to Act No. 87, H. 6, approved March 23, 1933, General Acts, 1933, page 81, which reads in pertinent part as follows:

"Section 1. The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expenses of transportation shall be \$3.00 per diem."

The administrative construction of the words "actual expenses" used in the above quoted section has been that when a person is using a private automobile in the service of the State of Alabama, he shall be allowed five cents per mile to reimburse the owner for using such automobile for the benefit of the State.

Sections 5 and 7 of Act No. 489, S. 303, approved September 22, 1939, General Acts, 1939, page 703, read respectively as follows:

"Section 5. Each member of the Commission shall serve as such without salary, but shall receive his actual expenses while engaged in the performance of his duties, and a per diem of Ten (\$10.00) Dollars per day, but not exceeding Six Hundred (\$600.00) Dollars per annum. The Chairman of the Commission shall be ex-officio the Recorder of Permits and Licenses and for his services as such shall receive one-third of all monies collected."

"Section 7. The Commission shall maintain a general office and such branch offices for the transaction of its business at such place or places as may be designated by the Commission. It may fix the salary of its secretary at a sum not exceeding One Hundred (\$100.00) Dollars per month, and in addition thereto the secretary shall receive his actual expenses while engaged in the performance of his duties."

It will be noted that in both of the above quoted sections of Act No. 489, supra, the words "actual expenses" are used.

It is a well known rule of statutory construction that when an administrative construction has been placed upon a statute, and the Legislature later adopts another statute with words of similar import, it will be deemed that the Legislature is aware of the administrative construction placed upon such words, and this construction will be given to the words used in the statute enacted by the Legislature. In the case of **State v. H. M. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46, the Supreme Court of Alabama, in speaking of the statutory rule of administrative construction, used the following language:

"So, for twelve years, the uniform construction of this statute by the administrative department has been to fix the license tax on the vehicle itself, designated by its tonnage classification well known among users of trucks. Meantime, the Legislature has twice re-enacted the classification in precisely the same terms.

"The administrative construction of this statute has not been casual, occasional, or incidental; but has been of daily state-wide application in the execution of the law by all the agencies charged with duty in that regard. The state's revenue from this registration, license, or tag tax is substantial, and the constant subject of legislative attention.

"Under these conditions, the re-enactment of the statute without change may be treated as a legislative approval of the departmental construction of the statute, quite as persuasive as the re-enactment of a statute, which has been judicially construed. 25 R. C. L. Section 274, p. 1043 et seq.; *State Tax Comm. v. Safety Transfer & Storage Co.*, 230 Ky. 225, 18 S. W. (2d) 991."

You are, therefore, advised that in my opinion the Chairman and Associate Members of the Alabama Boxing and Wrestling Commission and the Recorder of Permits and Licenses of the Alabama Boxing and Wrestling Commission may legally be allowed five cents per mile while using privately owned automobiles in their official business.

It is, of course, understood that if a private car is not used, but a public conveyance is adopted as a means of transportation, then only such amounts

as are actually paid for transportation may be paid to the Recorder of Permits and Licenses of the Alabama Boxing and Wrestling Commission and to the members of the Alabama Boxing and Wrestling Commission themselves for transportation.

I wish to refer you to Quarterly Report of Attorney General, Volume XVII, page 367, and Quarterly Report of Attorney General, Volume XV, page 53.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 24, 1940.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Filing Tax—Mortgages—Deeds—

1. Where purchaser of property subject to mortgage assumes payment of the mortgage debt, and the mortgagee thereupon executes an instrument extending payment of such debt, and mortgage filing tax is paid for record of said instrument, additional mortgage filing tax is not payable on a new mortgage with same parties, amount and maturity date, executed by purchaser to the mortgagee on other property as additional security for the debt assumed and extended.

2. Deed tax payable only on the fair market value of the equity of property conveyed at the time of execution of deed, to be determined by subtracting total mortgage debt thereon on which mortgage filing tax has been paid from fair market value of the property.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of May 6, 1940, follows:

"A mortgage in the sum of \$25,000 was duly filed for record in this County and the tax paid thereon. The property embraced in this mortgage was recently sold and the balance of the \$20,000 due on the mortgage was assumed by the purchasers. There has been filed for record in this County, among other papers relating to this transaction, the following:

"(1) A deed which recites the consideration as follows: 'One Hundred Dollars (\$100.00), assumption of the hereinafter described mortgage

and the execution of a purchase money mortgage securing Five Thousand Dollars (\$5,000.00).'

"(2) An extension agreement signed by the new purchasers of the property but extending the time of maturity of the mortgage executed by the former owner. The original mortgage was for \$25,000, but the extension agreement is for the balance due, or \$20,000. It is this mortgage or extension agreement which is the second part of the consideration

in the deed, namely 'assumption of the hereinafter described mortgage.'

"(3) A separate mortgage executed by the purchasers of the property to the original mortgagee, and conveying additional security for said \$20,000 loan. The amount of the indebtedness and the time of maturity are the same as in the extension agreement.

"(4) A purchase money mortgage for \$5,000 executed by the purchasers of the property to the former owners.

"We find no difficulty in determining that mortgage tax must be paid on the extension agreement for \$20,000 and the purchase money mortgage of \$5,000. (Papers number 2 and 4)

"We think no mortgage tax is due on the additional security mortgage, (paper number 3), but would like your opinion. Schedule 94 (d) Alabama Revenue Laws, Simon's Code, provides in effect that no additional privilege taxes will be due on instruments providing additional or substantial security for an indebtedness secured by an instrument premiously filed, etc., providing the secured indebtedness remains unchanged in amount and in time of maturity. You will note that the amount of the indebtedness and date of maturity in this mortgage offering additional security are the same as provided in the extension agreement. The amount and maturity date have been changed from that in the original mortgage, but it seems that the extension agreement should take care of this change.

"The other question is: On what amount should deed tax be collected? Should both \$5,000 and \$20,000 be deducted, leaving only \$100.00 as the amount on which deed tax should be paid?

From the foregoing statement, I understand that the purchases, in consideration of the extension by the original mortgagees of the indebtedness assumed by them, have executed a new mortgage on other property as additional security for the debt so extended and assumed; that the mortgage tax was paid on the filing of the extension agreement; and that the question is, whether a mortgage tax is also payable on the filing of the "additional security mortgage," so to speak, securing the same debt, identical in amount and of the same maturity as the debt recited in the so-called extension agreement.

Upon this hypothesis, no tax is payable upon the "additional security mortgage," by reason of subdivision (d) of Schedule 94 of Section 348 of the Revenue Act of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, p. 256, p. 479), reading as follows:

"(d) The privilege taxes required by law to be paid on mortgages, deeds of trust and similar instruments shall not be required on or for the filing of any such instrument, providing additional or substantial security for any indebtedness secured by an instrument previously filed, upon the filing of which the taxes provided by law have been paid or which was filed at a time when no such privilege taxes were required by law, provided the secured indebtedness remains unchanged in amount and in time of maturity."

This opinion is predicated, of course, upon the assumption that the parties to the extension agreement (on which the tax has been paid) and the parties to the "additional security mortgage" are the same, that debtor and creditor are the same in both instruments, as well as the amount and maturity of indebtedness being the same in both instruments.

The amount of deed tax payable is governed, of course, by Schedule 46 of Section 348 of the Revenue Act of 1935, *supra*. Assuming the value of the equity to be \$100, after deduction from the true value of the property of the total mortgage debt of \$25,000, the deed tax would be fifty cents. From the foregoing statement of facts in your request for an opinion, I think it may be safely assumed that the value of the equity does not exceed \$100. In the absence of notice or knowledge to the contrary, you may act on that assumption.

In support of this opinion, reference is made to former rulings and opinions by the Attorney General as follows:

Opinion dated May 20, 1939, to Hon. Wm. W. Hill, Judge of Probate, Montgomery County, Quarterly Report, Vol. XV, page 192.

Opinion dated March 15, 1939, to Hon. M. E. McConnell, Judge of Probate, Sumter County, Quarterly Report Vol. XIV, page 183.

Opinion dated July 5, 1938, to Hon. Saxon P. Poyner, Judge of Probate, Houston County, Biennial Report, 1936-38, page 702.

Opinion dated August 9, 1934, to Hon. W. S. Garner, Judge of Probate, Biennial Report, 1932-34, page 616.

Opinion dated September 23, 1932, to Hon. M. M. Fountain, Judge of Probate, Biennial Report, 1930-32, page 1046.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 24, 1940.

Hon. S. D. Bayer,
Superintendent of Education,
Greene County,
Eutaw, Alabama.

School's—Used of District Funds—

The funds arising from levying a special tax for school purposes in any school district under the jurisdiction of a county board of education shall be used for the exclusive benefit of the public schools of such district, provided, however, that in any school district where such tax is being levied there is no public school, the funds arising from levying said tax may be used for the purpose of transporting children residing in such district to a school located in another district.—(General Acts, 1931, p. 559).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"Some time in the past I think I have seen a copy of an opinion rendered by a former Attorney General to the effect that it is illegal to use the funds collected as district school taxes in districts other than the school district in which they were collected. If such an opinion has been rendered will you kindly send me a copy."

This office has rendered several opinions to the effect that it is illegal to use funds collected as district school taxes for the districts other than the district in which they are levied and collected. Said opinions were based on Section 289 of the School Code of 1927. However, since said section has been amended by Act No. 481, H. 373, approved July 22, 1931 (General Acts, 1931, page 559), I deem it expedient to render another opinion concerning the matter of your inquiry.

Section 289 of the School Code of 1927 provides as follows:

"289. Use of District Funds.—The funds arising from levying the special tax for school purposes in any school district under the jurisdiction of the County Board of Education shall be used for the exclusive benefit of the public schools of such district; and in the case of cities and towns under independent boards said County Tax Collector shall collect said taxes and pay over the same to the Treasurer of said City or Town to be used for the exclusive benefit of the schools thereof in accordance with the law."

In construing said section, this office has held that the funds derived from district tax must be used for the exclusive benefit of the particular district in which it was levied. **Biennial Report of Attorney General, 1926-28, pages 173 and 652.** The district tax of one district cannot be transferred to or expended in another district. **Biennial Report of Attorney General, 1928-30, page 1006.** The three-mill district tax could not be used to pay for trans-

portation of school children out of that district or to pay the teachers' salaries in another district. **Biennial Report of Attorney General, 1930-32, page 10.**

Section 289 of the School Code of 1927 was amended by Act No. 481, H. 373, approved July 22, 1931 (General Acts, 1931, page 559). The amended section provides as follows:

"Alabama School Code, be, and the same is hereby amended so as to read as follows: 289. Use of District Funds. The funds arising from levying a special tax for school purposes in any school district under the jurisdiction of the County Board of Education shall be used for the exclusive benefit of the public schools of such district, provided, however, that in any school district where such tax is being levied there is no public school, the funds arising from levying said tax may be used for the purpose of transporting school children residing in such district to a school located in another district. In the case of cities and towns under independent boards said county tax collector shall collect said taxes and pay over the same to the treasurer of said city or town to be used for the exclusive benefit of the schools thereof in accordance with the law."

The 1931 amendment was evidently enacted for the purpose of meeting the opinion of this office in the Biennial Report, 1930-32, page 10, *supra*.

In my opinion, the district tax in question must be used in accordance with the provisions of Section 289, as amended, *supra*. It must still be used for the exclusive benefit of the public schools in the district in which it was levied with the exception of the proviso concerning transportation of school children residing in a district in which no public school is located.

See *Smith v. Board of Education of Cullman County*, 236 Ala. 649, 184 So. 475; *In re Opinions of the Justices*, 231 Ala. 152, 164 So. 572; *City Board of Education of Athens v. Williams*, 231 Ala. 137, 163 So. 802; *First National Bank of Scottsboro v. Jackson County*, 227 Ala. 448, 150 So. 690.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 25, 1940.

Hon. I. C. Heck,
State Comptroller,
Capitol.

States—State Board of Adjustment—

State Board of Adjustment has no jurisdiction of claim of State employee for reimbursement for attorney's fees paid by him in defending civil suit against him individually, which suit arose out of act of said employee in the line and scope of his employment.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of April 29, 1940, in which you request my opinion as follows:

"The State Board of Adjustment has approved for payment a claim filed by Jim Starling, the amount approved for payment being \$75.00. This claim is as per Board of Adjustment file No. 577, and the date of approval was April 17, 1940.

"We are attaching a copy of the claim as filed signed by Jim Starling, Claimant.

"Please give me your official opinion, with reference to this claim being an obligation of the State."

An examination of the copy of the claim which is attached to your request for opinion discloses that it is a claim for reimbursement to a State employee for attorney's fee paid by him in defending a civil suit against him individually, which suit arose out of an act of said employee in the line and scope of his employment.

There seems to be authority for the expenditure of State funds for such a purpose. In the case of *Finnell v. Pitts*, 222 Ala. 290, 132 So. 2, the Supreme Court of Alabama upheld a judgment which one Pitts had secured against Woolsey Finnell et al., officials and employees of the State Highway Department of Alabama, for damages caused to Pitts' property as the result of the construction of a State highway by and under the direction of said officials and employees. Subsequently, the Legislature of Alabama by Act No. 391, H. 565, approved July 15, 1931, General Acts, 1931, page 462, made an appropriation from the funds of the State Highway Department to reimburse the said Finnell et al. for all monies paid or to be paid by them in satisfaction of the judgment which Pitts had secured against them, and also for all court costs and all reasonable costs and expenses incurred by them in the defense of the case in which the judgment was secured. Research fails to disclose where the validity of said act was questioned, either in the courts of this state, or before the Attorney General. On this authority, it would seem that the Legislature would have the power to make an appropriation of State funds for the reimbursement of a state employee for attorney's fee paid by him in defending a civil suit against said employee, which suit arose out of an act of said employee in the line and scope of his employment.

However, it is my opinion that the State Board of Adjustment does not have jurisdiction of such a claim. It is true that the State Board of Adjustment was created for the purpose of acting generally for the Legislature in hearing and considering claims which had theretofore been handled by the Legislature through the medium of individual relief bills. This is very clearly seen from a reading of the act which created the said Board, as amended, which is Act No. 546, II, 871, approved September 14, 1935, General Acts, 1935, page 1164, as Section 2 thereof was amended by Act No. 173, H. 266, approved March 1, 1937, General Acts 1936-37, page 205, as Section

1 thereof was amended by Act No. 449, H. 534, approved September 15, 1939, General Acts, 1939, page 602. However, the State Board of Adjustment is of limited jurisdiction and powers and may exercise only the jurisdiction and powers conferred by statute. I quote as follows from the opinion of Mr. Justice Thomas in the case of **Turner v. Lumbermens Mutual Insurance Company**, 235 Ala. 632, 180 So. 300:

"The statute in question did not create a right, but granted a privilege in the exact terms stated. And the State Board of Adjustment, so set up, was of limited jurisdiction and powers, and may exercise only the jurisdiction and powers conferred by the said statute, which is set out in *Lee, State Comptroller v. Cunningham*, 234 Ala. 639, 176 So. 477; *John E. Ballenger Const. Co. v. State Board of Adjustment et al.*, 234 Ala. 377, 175 So. 387; *Dunn Construction Co., Inc., v. State Board of Adjustment et al.*, 234 Ala. 372, 175 So. 383."

Section 2 of Act No. 546, supra, as amended by Act No. 173, supra, details the classes of claims which the State Board of Adjustment has the jurisdiction and power to hear and consider, and then contains the following pertinent provision:

"The jurisdiction of the said Board of Adjustment is specifically limited to the consideration of the claims hereinabove enumerated, and no other."

I have carefully examined the classes of claims which the State Board of Adjustment is given the jurisdiction and power to hear and consider, and the claim now before me does not come within any of these classes. The premises considered, it is my opinion that the State Board of Adjustment did not have the jurisdiction and power to hear and consider this claim. This being true, its order and decree in respect thereto is without legal force, evidentiary or otherwise, and you are without legal authority to issue a warrant in accordance with its mandate. *Lee v. Cunningham*, 234 Ala. 639, 176 So. 477.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 25, 1940.

Hon. Vernol R. Jansen,
County Attorney,
Mobile County,
300 Masonic Temple Bldg.,
Mobile, Alabama.

Mobile County Civil Service Act—

1. Employees of the tax collector and tax assessor provided for in Local Acts, 1935, pages 139 and 141, held to be within the Classified

Service (Act No. 241, H. 401, approved August 15, 1935 and Act No. 242, H. 473, approved August 15, 1935).

2. The employment of clerks under decree of Circuit Court of Mobile County for the various offices designated by Act No. 102, H. 259, approved April 10, 1936 (Local Acts, 1936, p. 61) was not terminated by the repeal of Act No. 102 by Act No. 265, H. 594, approved August 24, 1939 (Local Acts, 1939, p. 155).

3. Personnel Board authorized to adopt a pay plan changing the compensation of county employees, although such compensation was previously fixed by law.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 17, 1940, in which you request my opinion as follows:

"By the Local Acts of 1935, pages 139 to 143, inclusive, the method and basis of compensation of the tax collector and tax assessor of Mobile County was changed and a system was set up whereby the salary of the assessor and collector, together with an allowance not to exceed a sum certain was provided for employees. The compensation was payable by deducting from the tax collections made by the tax collector's office, and pro-rated against the school system, the State, and the County of Mobile.

"As you know, we have a nine mill school tax, the State ad valorem tax of 7½ mills, a five mill tax for the retirement of a five million-dollar County road bond issue, and the balance of ad valorem taxes payable to the County Treasurer, totaling twenty-eight mills.

"By an act approved April 10, 1936, printed in the Local Act of the Extra Session of 1936, the legislature authorized the Circuit Court of Mobile County to provide these offices and the Probate Court, Circuit Clerk and Register in Chancery with such additional clerical employees as might, on petition, be regarded as necessary by the Court.

"By an Act approved August 24, 1939, appearing on page 155 of the Local Acts of 1939, Regular Session, the Legislature repealed this act with the effective date January 1, 1940.

"Prior to January 1, 1940, and during the same session, the Legislature passed an act providing for a classified service under the control of a personnel Board, 'including all offices, positions and employment in Mobile County, or any such cities therein, as these offices, positions and employment now exist, the holders of which are paid, whether by salary, wages or fees, in whole or in part from funds of Mobile County, or any such City.'

"This act further provided, in Section 9, that the Personnel Board adopt rules having the force and effect of law for the administration of

the act. Subdivision 'C' of Section 9 provides, in part, 'such rules may include any provisions relating to the classified service, not inconsistent with the laws of the State, which may be necessary or appropriate to give effect to the provisions and purposes of this act.'

"This Personnel Board has announced that it will shortly adopt a pay plan, and have adopted a rule which provides designated classifications shall receive compensation within a range from the minimum and the maximum compensation named in the plan. The employee now receiving less than the minimum provided for a classification will automatically be increased to the minimum salary or compensation for that classification, and an employee now receiving more than the maximum so provided, will immediately be reduced to the maximum compensation provided for that classification.

"Please advise me:

"1. Are the employees of the tax collector and tax assessor provided for in the Local Acts of 1935, pages 139 and 141, within the classified service?

"2. Was the employment of clerks under decree of the Circuit Court of Mobile County for these various offices, terminated by Act No. 265, Local Acts of 1939, page 155, on January 1, 1940?

"3. May the Personnel Board adopt a pay plan in accordance with the proposed rule above referred to, changing the compensation of a County employee previously fixed by law, or should the County Board continue to issue warrants for the compensation provided for by law, even though this compensation is below the minimum and/or above the maximum compensation provided for employees of that classification on the theory that this pay plan 'is inconsistent with the laws of the State.'"

In my opinion, your first inquiry should be answered in the affirmative, i. e., the employees of the tax collector and tax assessor provided for by Act No. 241, H. 401, approved August 15, 1935 (Local Acts 1935, p. 139) and Act No. 242, H. 473, approved August 15, 1935 (Local Acts, 1935, p. 141) are within the Classified Service.

By Section I of Act No. 470, H. 952, approved September 15, 1939 (Local Acts, 1939, p. 298) the "Classified Service" is defined as including:

"All offices, positions, and employment in Mobile County or any such city therein as these offices, positions and employment now exist or as they may hereafter exist, the holders of which are paid, whether by salary, wages or fees, in whole or in part, from funds of Mobile County or any such city, or the holders of which receive their compensation from any elective official and perform duties pertaining to the office of such elective official or officer, except those placed in the 'Unclassified Service' by Section 2 hereof."

By Act No. 241, supra, it is provided that the tax collector may employ **"at the public expense, such assistants to aid him in the performance of his**

official duties as he may determine to be adequate to enable a proper discharge of the duties of the office." A similar provision is found in Act No. 242, *supra*, with respect to the power of the tax assessor to employ assistants.

It is true that in both Act No. 241, *supra*, and Act No. 242, *supra*, it is provided that "such assistants shall be employees of the tax collector (tax assessor)." However, this fact alone is not sufficient to remove these employees from the provisions of the Mobile County Civil Service Act for it will be noted from the above quoted definition of "Classified Service" that it applies to employees paid from funds of Mobile County, regardless of the source of their employment.

Moreover, although Acts No. 241 and No. 242, *supra*, provide that the assistants shall be employees of the tax collector and tax assessor, in legal contemplation, in so far as the Mobile County Civil Service Act is concerned, these employees, being paid as they are from public funds and being engaged in the work of the county—in the public service—are county employees rather than employees of the tax collector (tax assessor). Cf. **People v. McCollough**, 254 Ill. 9, 98 N. E. 156.

On the other hand, if the employees in question are paid by the officials concerned then, by the specific terms of the definition, *supra*, they are included in the "Classified Service."

You are, therefore, advised that the employees of the tax collector and tax assessor provided for under the Local Acts, *supra*, are within the Classified Service.

Your second inquiry, in my opinion, should be answered in the negative.

Act No. 265, H. 594, approved August 24, 1939 (Local Acts, 1939, p. 155) providing for the repeal of Act No. 102, H. 259, approved April 10, 1936 (Local Acts, 1936, p. 61) which directed the circuit judges, or a majority of them, of Mobile County to authorize certain designated officers to employ clerks in addition to those provided for by law, the number and salaries of such clerks to be fixed by the circuit judges, or a majority of them, did not have the effect of terminating the employment of those employees employed under the provisions of Act No. 102, *supra*, prior to its repeal. It is a well settled rule of statutory construction that an act is not to be given retroactive effect unless the intention clearly appears from the language employed by the Legislature. See numerous cases collated in 18 Alabama Digest, Statutes, Key Nos. 263 et seq. In my opinion, the intention of the Legislature in providing for the repeal of Act No. 102 was merely to remove from the circuit judges the burden imposed on them by the act and no intention can be found, either express or implied, to terminate the employment of those clerks employed while the act was in operation. It would appear that these employees are now subject to the provisions of the Mobile County Civil Service Act and subject to regulation thereunder.

Answering your third inquiry, you are advised that the Personnel Board may adopt a pay plan in accordance with the provisions of Section XI, and, as authorized by Section IX, extend such pay plan to the employees in question, even though such pay plan changes the compensation previously fixed by law.

You will note that in an opinion rendered by this office to Hon. P. B. Hamilton, Chairman, Personnel Board, Mobile County, under date of December 29, 1939, Quarterly Report of Attorney General, Vol. XVII, page 429, it was held that Section XXXVI, the repealing clause of the Mobile County Civil Service Act, had the effect of repealing all laws, general, local or special, enacted prior to the effective date of the act and in conflict therewith. A reading of Section XXXVI reveals that it was clearly the legislative intent to repeal all provisions of law fixing the rate of compensation for services contrary to the express or implied effect and provisions of the act, to the end that the terms of the act should be fully effective, any other laws or parts of laws to the contrary notwithstanding. In view of his fact, it becomes apparent that those provisions of law establishing salary or other compensation for employees in the "Classified Service" in Mobile County were repealed in so far as necessary to permit the establishment of the pay plan, authorized and required under Section XI of the Act, by the Director and the Personnel Board. Cf. *Heck v. Hall*, 190 So. 280, 287. It cannot be argued that the pay plan would be "inconsistent with the laws of the State" for, as stated, such laws are specifically repealed by the Mobile County Civil Service Act in so far as they would tend to conflict with the authority given to the Board to establish a pay plan for the employees in the Classified Service.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 29, 1940.

Dr. Walter B. Jones, Director,
Alabama Museum of Natural History,
Department of Conservation,
Montgomery, Alabama.

Filing Tax — Alabama Museum of Natural History—

1. Agency of State not subject to deed filing tax.
2. Alabama Museum of Natural History is agency of the State.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"Recently the Alabama Museum of Natural History took a deed from R. J. Griffin and Elizabeth Hill Henagan to certain land in Hale County.

"In your opinion is the Alabama Museum of Natural History required to pay deed tax upon the recording of this deed?"

I am under the impression that inasmuch as the Alabama Museum of Natural History is a branch or department of the State Geological Survey, as such it has a status similar to any department or branch of the State.

"It is for this reason that I request your opinion as to the necessity of the payment of a deed tax upon the recording of a conveyance made to the said Museum."

I am of the opinion that your inquiry should be answered in the negative.

Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256 (at page 456)), provides in pertinent part as follows in Schedule 46 thereof:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923 shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to-wit: * * *"

It has been held in numerous opinions of this office that an arm or agency of the State is not subject to the payment of the filing tax levied under the authority of Schedule 46, set out above, when such arm or agency is the grantee. See opinions to Hon. G. L. Malone, under date of September 22, 1933, Biennial Report of Attorney General, 1932-34, page 339; Hon. Eugene H. Hawkins, under date of February 26, 1936, Quarterly Report of Attorney General, Vol. II, page 202; Hon. J. Lee Smith, under date of March 2, 1939, Quarterly Report of Attorney General, Vol. XIV, page 166. Cf. opinion to Hon. Gordon Persons, under date of February 17, 1937, Quarterly Report of Attorney General, Vol. VI, page 76.

Therefore, the question presents itself as to whether or not the Alabama Museum of Natural History is an arm or agency of the State.

The Alabama Museum of Natural History is operated as a department or division of the State Geological Survey, which is created by Sections 1033-1045 (as amended by Act No. 386, H. 6, approved August 31, 1927, General Acts, 1927, page 456) of the Code of Alabama, 1923. The expenses of the Alabama Museum of Natural History are paid by the State of Alabama. The employees of the Alabama Museum of Natural History are in the classified service of the State and are subject to the provisions of the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, page 68). The Director of the Alabama Museum of Natural History is the State Geologist, whose appointment is provided for by statute (Section 1033, cited above). Lands held by the Museum are held by it as a division of the State Geological Survey. The money used to purchase this land in question was appropriated by the Legislature for that purpose in 1939 (Act No. 247, S. 239, approved August 24, 1939, General Acts, 1939, page 44).

The premises considered, it is my opinion that the Alabama Museum of Natural History is an agency of the State and is, therefore, not subject to the payment of a filing tax on an instrument conveying an interest in property to the said Museum.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 29, 1940.

Dr. L. N. Duncan,
President, A. P. I.,
Auburn, Alabama.

State Institutions — Liability to suit.

State institutions created for educational purposes are not liable for damages arising from negligent operation of an automobile operated by an officer, agent, or employee of such institution engaged in official business for the institution. Constitution of 1901, Section 14.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 20, 1940 follows:

"A great many members of our staff travel in their official business in their personally owned cars. In such cases we reimburse the owner of the car while in public use at the rate of 5 cents per mile.

"The impression seems to prevail in some quarters that the institution here would be responsible or liable for damages done by an automobile personally owned while being operated for public services.

"Is this correct? That is, will the institution in any way be liable or responsible for damages done by a personally-owned car while it is being operated for public services, as indicated above."

It is a well settled law of this State that public institutions created by the State for charitable or educational purposes are a part of the State or a mere agency of the State and, therefore, not subject to suit in an action for tort, or otherwise, by reason of Section 14 of the Constitution of 1901, which forbids suits against the State.

Turk vs. County Board of Education of Monroe County, 222 Ala. 177, 131 So. 436;

Alabama Girls Ind. School. vs. Reynolds, 143 Ala. 579, 42 So. 114;

Alabama Ind School vs. Adler, 144 Ala. 555, 42 So. 116;

White vs. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454;

Comer vs. Bankhead, 70 Ala. 496.

In **Turk vs. County Board of Education of Monroe County**, *supra*, it was held that a county board of education, being a mere agency of the State, was not liable in a tort action for damages arising out of the negligence of a school-bus driver acting within the line and scope of his employment as such driver.

Therefore, I am of opinion that the Alabama Polytechnic Institute, being an institution of the State whose property is owned by the State, would not be liable for damages arising out of the negligent operation of an automobile by a member of its staff while traveling upon official business, although the expenses of such journey are paid by the institution.

It may not be improper to observe, however, that such member of its staff, although engaged on official business, would be personally liable for damages for any injury proximately resulting from his negligent operation of his automobile.

See also Biennial Report, Attorney General, 1920-22, page 61, for further discussion of this question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 29, 1940.

Hon. F. V. White, Clerk,
Board of Revenue, Sumter County,
Livingston, Alabama.

Counties — Sumter County—

Resolution of Board of Revenue of Sumter County that members be paid a salary of \$100 per month, being in conflict with statutory law fixing said compensation, is of no force and effect (Local Acts, 1919, pages 51 and 130).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 22, 1940, in which you request my opinion as follows:

"The Board of Revenue of Sumter County, Alabama, has instructed me to request your earliest opinion as to the legality of the following resolution passed by the Board:

"Be It Resolved by the Board of Revenue of Sumter County, Alabama, that the members of the Board be paid from the County funds a salary of One Hundred Dollars per month each.'

"The Board wants to know whether under the existing law pertaining to the Board the Board may legally pay the salaries as set out in the resolution."

I am of the opinion that your inquiry should be answered in the negative.

The Board of Revenue of Sumter County was established and the Court of County Commissioners of said county abolished by Act No. 160, S. 194, approved February 22, 1919 (Local Acts, 1919, page 51). Section 11 of said act provided for the compensation of the members of said Board of Revenue. This section, among others, was amended by Act No. 326, H. 546, approved September 9, 1919 (Local Acts, 1919, page 130) and, as amended, provides as follows:

"Section 11. Be it further enacted that the members of said Board of Revenue shall each be entitled to Five Dollars per day for each day of actual service rendered; five cents per mile for traveling to and from the sittings of said Board of Revenue, and to and from the place where any service is rendered by them, to be paid out of the county treasury on certificates or warrants signed by the President of the Board of Revenue; provided that no member of the Board of Revenue shall, during any one year, receive more than three hundred dollars from the county treasury for any and all services rendered by him either as a member of the Board of for any work or labor done for, or services rendered to the County."

The 1919 Local Acts, above cited, have been subsequently amended, but not material to the inquiry presented. See Act No. 43, S. 53, approved November 1, 1921 (Local Acts, 1921, page 77), and Act No. 178, H. 331, approved July 29, 1927 (Local Acts, 1927, page 91). I also wish to refer you to the case of **Jarman v. Bennett**, 207 Ala. 654, 93 So. 650, which deals with the constitutionality of the 1921 act, *supra*.

Since Section 11 of the original 1919 act, as amended by the later 1919 act (above quoted), has not been amended subsequently, it follows that the compensation of the members of the Board of Revenue of Sumter County is governed by said 1919 amendment. The resolution authorizing that the members of said Board be paid a salary of \$100 per month is in conflict with the statutory law fixing their compensation and is, therefore, of no force and effect.

The above statements relative to proper compensation of the members of the Board of Revenue of Sumter County are based on the assumption that the 1919 Local Acts, *supra*, are constitutional. In this connection I wish to refer you to the case of *Morgan County v. Edmonson*, 238 Ala. 522, 192 So. 274.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 30, 1940.

Hon. B. G. Robison,
Judge of Probate,
Pickens County,
Carrollton, Alabama.

Pickens County—

Since the fine and forfeiture fund of Pickens County has been abolished and the monies in the same transferred to the general fund of the county, claims for guard allowance accruing more than one year prior to the time presented to the commissioners' court of Pickens County are barred.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"Mr. S. H. Ball of Carrollton, Alabama, who served four years as sheriff of Pickens County from the first Monday after the second Tuesday in January, 1935, has filed a claim of \$736.00 for guard fees during said term. These fees are claimed under Section 3741 of the 1923 Code of Alabama, and the claim for said fees during said entire term was first filed or presented to the Court of County Commissioners of the county on March 25th, 1940.

"Acting under a Local Act of Legislature of 1907, page 500, Pickens County does not have a Fine and Forfeiture Fund. All funds collected that would, under the General Laws of Alabama, be paid into the Fine and Forfeiture Fund, are now paid into the General Fund of said county. All claims for guard fees, etc. are presented to the Court of County Commissioners and audited by them before being paid.

"I shall be glad to have you advise me at your earliest convenience whether or not the Court or County Commissioners of said county can

legally pay this claim now, as more than twelve months have elapsed since any part of said fees became due.

"I have read your opinion rendered February 5th, 1940, to Hon. J. R. Alldredge, Chairman of Board of Finance and Control of Cullman County, but wish to have your opinion, after you have read the above Local Act, before declining to pay the claim."

In my opinion, the court of county commissioners of Pickens County cannot legally pay Mr. Ball's claim since, as you state, more than twelve months have elapsed since any part of the allowance became due.

In an opinion rendered to Hon. John H. Daniel, Clerk of the Circuit Court, Pickens County, under date of June 8, 1939, Quarterly Report of Attorney General, Vol. XV, page 276, the Local Act of 1907, to which you refer in your letter of inquiry (Act No. 376, H. 551, approved July 19, 1907, Local Acts, 1907, page 500) was considered and the conclusion there reached that Section 2 of the Act, which was therein set out, abolished the fine and forfeiture fund, and that all claims arising against such fine and forfeiture fund were legally chargeable against the general fund of Pickens County.

This being true, the opinion to Hon. J. R. Alldredge, Chairman, Board of Finance and Control of Cullman County, Alabama, rendered under date of February 5, 1940, Quarterly Report of Attorney General, Vol. XVIII, page 161, is particularly applicable to your inquiry. In that opinion it was held, where the fine and forfeiture fund of Cullman County had been merged into the general fund of the county and all claims theretofore paid out of the fine and forfeiture fund were made payable out of the general fund of the county, that such claims should be sworn to, presented, audited, and passed by the commissioner's court of other like governing body and were subject to the same limitations as other claims against the general fund. It was further held, specifically, that Section 228 of the Code of Alabama, 1923, which provides, that "all claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or that same are barred * * *", applied and that claims not presented within one year would be barred. *Jacob Michael, Jr. vs. Marengo County*, 52 Ala. 159.

The premises considered, you are, therefore, advised that since the claims in question were not presented within one year from their accrual, same are now barred by the statute of limitations set up by Section 228, supra, Cf. Biennial Report of Attorney General, 1936-38, page 349.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1940.

Hon. F. B. Pratt,
Superintendent of Education,
Bibb County,
Centreville, Alabama.

Schools—

The County Board of Education held authorized to contract with N. Y. A. boys for labor on school buildings and as part of the compensatory contract offer transportation to and from place of employment.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 16, 1940, in which you request my opinion as follows:

"On December 5th, 1939 our County Board of Education sold bonds against the District No. 2 tax for the following uses:

"\$1790.00 for Equipment

\$1500.00 for Vocational Building at Bibb County Training School

\$6210.00 for Two rooms at Brent Jr. High (White) and Repairs on Old Building.

"In our building program at Brent we can accomplish about twice as much by using N. Y. A. labor, but some of these boys live too far to walk to Brent. Will it be legal for us to pay transportation for these boys from the fund set aside for the Brent School? We cannot get the project unless we arrange to transport those boys who are too far away to walk. However, it will be a good saving for us since N. Y. A. labor is given to us and by working through this plan it means we can really put the whole building at Brent in good shape.

"A prompt reply will be appreciated so as to facilitate getting our work started."

In reply, I wish to advise you that in my opinion your question should be answered in the affirmative.

In my judgment, the contract of employment offering transportation to N. Y. A. boys as part compensation for the work or labor on this building program is within the authority of the county board of education.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1940.

Hon. Walter B. Jones, Director,
Department of Conservation,
Montgomery, Alabama.

Department of Conservation — Salt Springs Lands—

Title to salt springs lands in this State is in the State of Alabama and such lands may be used by the State as a game sanctuary.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion of May 27, 1940, follows:

"There is pending between this Department and the Bureau of Biological Survey negotiations looking toward the establishment of a game sanctuary on the state-owned Salt Springs lands in Clarke County.

"We have been requested by this Bureau to furnish an opinion of the Attorney General to the effect that the State owns the lands involved, and that the State has the right to establish in cooperation with the Federal Government a game sanctuary on these lands."

In answer to your inquiries, it is my opinion that the title to the salt springs lands in this State is in the State of Alabama and that the State has the right to establish, in cooperation with the Federal Government, a game sanctuary on said lands.

Sections 1494 and 1495 of the Code of Alabama, 1923, provide as follows:

"1494. Salt springs may be leased and timber sold. — The governor may lease the salt springs and lands granted to the state under the second clause of the sixth section of the act of congress of March 2, 1819, to the best advantage, in conformity with the provisions of the grant, and may sell the timber on said lands or any part thereof whenever he shall deem it to the interest of the state to do so."

"1495. Lands of state; right to quarry limestone and clay authorized. —The governor may sell the right to quarry limestone and clays necessary or proper for the manufacture of cement upon the following lands: Sections 21 and 28, township 5 N., range 2 E., or any part thereof. He may sell the said rights for such price and upon such terms as to him appear just and reasonable. The sale of such rights shall confer upon the purchaser landing privileges, all necessary rights of way for the purpose of quarrying the material and moving the same, and all rights and privileges which are necessary for the enjoyment of the rights granted; **but the state shall retain possession of the lands, and have the right to the use and enjoyment thereof for every other purpose whatever.**" (Emphasis supplied)

Clause 2 of Section 6 of the Act of Congress of March 2, 1819, referred to in Section 1494, supra, provided in part as follows:

"That all salt springs within said territory, and the lands reserved for the use of the same, * * * shall be granted to the said State, for the use of the people of said State, the same to be used, under such terms, conditions, and regulations as the Legislature of the said State shall direct; provided, the said Legislature shall never sell nor lease the same for a longer term than ten years at any one time."

The tract book in the office of the Secretary of State contains the following notations relative to the salt springs lands as to ownership and acreage. A description of the lands involved with the acreage and notations as shown by the said tract book is as follows:

Section 21, Township 5N, Range 2E, 620 acres

Section 28, Township 5N, Range 2E, 639 acres

Section 21, Township 7N, Range 1E, 638.80 acres

Section 22, Township 7N, Range 1E, 639.40 acres

Section 27, Township 7N, Range 1E, 639.40 acres

According to these records, the above described land was granted by the United States to the State of Alabama by selection of March 2, 1819, and there is a memorandum noted on each section as follows: "Salt lands approved to the State June 5, 1896, by the Secretary of the Interior."

From the above it appears that the title to the salt springs lands in question is in the State of Alabama and that it has the right to the use and enjoyment thereof for every purpose whatsoever, subject to the lease limitation of ten years. As to the right of the State of Alabama to establish on said lands a game sanctuary, I wish to call your attention to Section 40 of Act No. 594, S. 368, approved September 29, 1923 (General Acts, 1923, page 773), which provides as follows:

"40. LANDS HELD IN FEE OR TRUST BY STATE DECLARED FOREST RESERVES AND GAME REFUGES.—All lands belonging to the State of Alabama, whether held in fee or in trust by the State, be and the same are hereby declared forest reserves and game refuges."

The above section of the 1923 act is incorporated into the Code of 1923 as Section 4224. In my judgment, the section is ample authority for the State to establish on said state-owned lands, with the cooperation of the Federal Government, a game sanctuary.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1940.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Capitol.

Mattresses — Pillows — Sections 4946-4957, Code of 1923.

The provisions of Section 4946-4957 of the Code of 1923 prohibiting the sale or offer for sale of mattresses without the brand or label as therein provided attached, do not include pillows.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of May 17, 1940 follows:

"We are interested in securing your opinion as to whether the provisions of Sections 4946-4957 of the Alabama Code of 1923, regulating the labeling and branding of mattresses and comforts, also cover pillows.

"We wish to call your attention particularly to Section 4954, which gives the definition of Mattress as follows:

"'4954. Definition of Mattress. — A mattress or comfort within the meaning of this chapter shall include any quilted bed or pad, tufted or not tufted, stitched or otherwise finished bed or pad, stuffed with excelsior, cotton, jute, hair, husks, sea moss, bamboo, wool, fibre, floss, kapock, felted cotton, felt, shoddy, African fibre, Louisiana tree moss, or other material used for this purpose, sterilized feathers excepted.'

"Although the word 'Pillow' has not been mentioned in this definition, the question arises as to whether or not a pillow might come within the definition of a 'quilted bed or pad.'"

My answer to your inquiry is in the negative.

The Code sections applicable to your inquiry are found in Chapter 182 of the Code of 1923, which chapter is composed of Section 4946-4957, inclusive.

Section 4956 of the Code of 1923 reads as follows:

"Section 4956. Penalty for violating chapter. — A person who sells, offers for sale, gives away, manufactures or causes to be manufactured with intent to sell, any mattresses or comforts which are not branded or labeled pursuant to the provisions of this chapter, or who falsely brands or labels any mattresses or comforts, or who knowingly fails or neglects to state the true and actual quality and quantity of the materials used in any mattress or comfort, shall upon conviction thereof be fined not less than twenty-five dollars, nor more than five hundred dollars, or imprisoned in the county jail not more than six months, or both."

It will be noted from the above quoted section that it is a criminal offense to violate any of the provisions of Chapter 182. It, therefore, follows that all of the sections contained in said chapter are penal in nature.

It is a well known rule of statutory construction that statutes penal in their nature must be strictly construed, and such construction cannot be extended beyond the natural and ordinary meaning of the language used in such statutes. *Gunter v. Leckey*, 30 Ala. 591, *Young v. State*, 58 Ala. 358, *Duman v. State*, 17 Ala. App 492, 86 So. 162, *Westenhaven v. Dunnivant*, 225 Ala. 400, 143 So. 823.

Section 4954 of the Code of 1923 reads as follows:

"Section 4954. Definition of mattress. — A mattress or comfort within the meaning of this chapter shall include any quilted bed or pad, tufted or not tufted, stitched or otherwise finished bed or pad, stuffed with excelsior, cotton, jute, hair, husks, sea moss, bamboo, wool, fibre, floss, kapock, felted cotton, felt, shoddy, African fibre, Louisiana tree moss, or other material used for this purpose, sterilized feathers excepted."

If pillows are included under the provisions of Chapter 182, *supra*, they must be included within the natural and ordinary meaning of the language used in the above quoted section.

Webster's New International Dictionary, Second Edition, defines a mattress to be:

"A tufted bed; a bed stuffed with hair, moss or other suitable material, and tufted or otherwise fastened."

Said dictionary defines a pad to be:

"In general, a cushion; a mass of anything soft; stuffing; something of the nature of cushion used to lessen or prevent the effect of jarring, impact, pressure, or friction; something used to fill out, to increase the size or width, to alter the natural form."

Said dictionary defines a bed to be:

"An article of furniture to sleep or take a rest in or on; a couch."

Said dictionary defines a pillow to be:

"Anything used to support the head of a person when reposing; esp., a sack or case filled with feathers, down, hair, or other soft material."

You are, therefore, advised that in my opinion a pillow does not come within the natural or ordinary meaning of the word "mattress", "bed", or "pad".

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

May 31, 1940.

Hon. Herman Longshore,
Tax Assessor,
Lauderdale County,
Florence, Alabama.

Taxation — Municipal Taxes—

Tax Assessor assessing municipal taxes of a municipality within the purview of Act No. 300, H. 864, approved June 26, 1931 (General Acts, 1931, p. 337) is entitled to one per cent commission on all taxes collected.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 29, 1940, in which you request my opinion as follows:

"Will you please advise whether or not, under Section 36 of Act 300, approved June 26, 1931 (General Acts, 1931, page 337) the Tax Assessor of Lauderdale County is entitled to compensation for the assessment of taxes for the City of Florence at the rate of one percent of such collections (the City of Florence being one of the cities that comes within the purview of the 1931 Act, *supra*).

"I am aware of the fact that in an opinion rendered by your office to the Tax Assessor of Covington County, Alabama, on February 20, 1940, you stated that Section 36 of the Act of 1931 had been amended by the Act of 1939 (Act No. 57, approved February 27, 1939), by which amendment the compensation was reduced to one-half of one percent.

"In an opinion to Honorable Chas. W. Lee, under date of June 23, 1937 (Quarterly Report April 1, 1937 through June 30, 1937, Volume 7, page 256) it was held that the General Revenue Act of the Legislature of 1935 did not repeal the Act of 1931.

"The effect of this opinion was to hold that the Act of 1931 applied only to cities in the population class of 6500 to 15000, both inclusive, and that it did not repeal Section 3095 of the Code of Alabama 1923. (Section 3095 having been carried forward in the successive General Revenue Acts of the Legislature of 1935.)

"As I read the several opinions from your office and the Acts, it appears to me that the last paragraph in your opinion to the Tax Assessor of Covington County is dicta. Andalusia not coming within the population classification of 6500 to 15000, would not come under the Act of 1931, but would come under the provisions of the General Revenue Acts.

"If the opinion of June 23, 1937, holding that the effect of the Act of 1931 was to provide certain mandatory administration provisions for the

assessment and collection of ad valorem taxes for those cities within specified population range was correct—and it appears to me that it was—then the Act of 1931 stands without amendment, and the compensation provided for Assessors by Section 36 of said Act is still the law in so far as the assessment of municipal taxes of municipalities within the purview of the 1931 Act, supra, is concerned.

“I will appreciate your opinion on this point.”

In my opinion, a Tax Assessor who assesses the municipal taxes of a municipality within the purview of Act No. 300, H. 864, approved June 26, 1931 (General Acts, 1931, p. 337) is entitled to one percent commission on all taxes collected in accordance with the provisions of Section 36 of said act, which reads as follows:

“Section 36. The tax assessor of such counties in which such cities are situated shall be entitled to receive out of the first moneys collected for such cities, to-wit, One Per-cent on all taxes collected for such cities each year.”

In the opinion to Hon. Chas. W. Lee, State Comptroller, Capitol, under date of June 23., 1937, Quarterly Report of Attorney General, Vol. VII, page 256, to which you refer in your letter of inquiry, it was held that Act No. 300, supra, was not repealed by Section 201 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256). In the course of the opinion it was stated as follows:

“The two laws (Act No. 300, supra, and Section 201, supra) merely provided different routes to reach the same objective; they were co-extensive and cooperative. * * * Both have distinct, but not conflicting, fields of service and both have a common purpose (the collection of municipal taxes), although different administrative rules in the performance of that common purpose.”

The same reasoning applies as to the effect of Act No. 57, H. 183, approved February 27, 1939 (General Acts, 1939, p. 67), which amended Section 201, supra, upon Act No. 300, supra. In my opinion, Act No. 57, supra, did not repeal, or amend in any way whatsoever, Act No. 300, supra.

On the contrary, the general effect of Act No. 57, supra, is as stated in the following excerpt from an opinion rendered to Hon. J. Collier Merrill, Tax Collector, Covington County, Andalusia, Alabama, under date of May 27, 1931, Quarterly Report of Attorney General, Vol. XV, page 231, which is an opinion construing said act:

“It is my opinion, therefore, that the Legislature not only intended to continue the use of the machinery and procedure theretofore authoritatively employed for the assessment and collection of municipal taxes and not in conflict with the amendatory act but also that it intended to change the existing laws as to the matter of separation in the manner authorized by Act No. 300 (General Acts, 1931, p. 337) approved June 26, 1931, which is the act referred to in the amendatory act and in the opinion of the court in the case of *City of Opp v. Brogden*, supra. **However, the intention of the Legislature was to confine such change to the assessment and collection machinery and procedure, including**

sale and redemption, without ingrafting other provisions of the act not pertinent to such assessment and collection." (Emphasis supplied)

The following, which is the last paragraph of the opinion to Mrs. C. F. Hart, Tax Assessor, Covington County, Andalusia, Alabama, under date of February 20, 1940, Quarterly Report of Attorney General, Vol. XVIII, p. 259, contains an inapt statement in regard to the effect of Act No. 57, supra, upon Section 36 of Act No. 300, supra:

"It should be noted that whereas by Section 36 of the act of 1931 (Act No. 300), aforementioned, the assessor's commissions were fixed at one per cent, the act of 1939 (Act No. 57) provides they shall be fixed by ordinance of the city governing body at not exceeding one-half of one per cent, so that to that extent the former act has been modified in respect to commissions."

In the light of what has been said hereinabove, it is apparent that such statement is inadvertent and erroneous. The holdings of that opinion are here adhered to, but the above quoted statement is hereby overruled, and the reasoning of the opinion to Mr. Merrill, supra, on this subject is substituted therefor. In that opinion, his first question was as follows:

"1. What is the maximum compensation that the tax assessor and collector are respectively entitled to receive for assessing and collecting municipal taxes of the municipality which invokes the aid of Section 201 as amended?"

and the answer given thereto was:

"1. The maximum compensation to which the Tax Assessor and the Collector are respectively entitled is 'not to exceed one-half of one per cent for assessing and one-half of one per cent for collection.' This provision was contained in Section 201, supra, prior to the amendment and still appears in said section as amended. No change in this provision was made by the amendment."

Recapitulating, it is my opinion that the assessment and collection of municipal taxes of all municipalities within the purview of Act No. 300, supra, i. e., all municipalities with a population of not less than 6,500 nor more than 15,000 inhabitants, should be governed in the entirety by the provisions of Act No. 300, supra, and are not affected in any way by the provisions of Section 201, supra, as originally enacted, or as amended by Act No. 57, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 31, 1940.

Hon. Leon Y. Sadler, Jr.,
Member of Legislature, Wilcox County,
Camden, Alabama.

Wilcox County—Local Act No. 436, S. 397, approved September 13, 1939 (Local Acts 1939, p. 261).

Said Act establishing a court of county commissioners for Wilcox County and Section 6 thereof not unconstitutional as offensive to Section 105 of the Constitution of 1901.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 11, 1940 follows:

"At the request of Mr. Tom Roberts, Camden, Alabama, who was a candidate for County Commissioner for Wilcox County, I am requesting that your office give a ruling on the constitutionality of Act No. 436, Section No. 6, page 264 of Local Acts of Alabama passed at Regular Session of the Legislature, 1939.

"Mr. Roberts was third high candidate for Commissioner in votes received, yet according to Section 6 of Act 436, he was defeated."

Act No. 436, S. 397, approved Sept. 13, 1939 (Local Acts 1939, p. 261) purports to establish and regulate a Court of County Commissioners for Wilcox County, and follows in large measure the general provisions of law as to such county governing bodies embodied in Chapter 270 of the Code of 1923 and the acts amendatory thereof.

The only provisions of general law as to election of members of such courts are contained in the Code of Alabama 1923, Sections 413, 414, 417, 2569, and 6748.

It is to be noted that in none of these statutes is there any specific provision as to election of members of such county governing bodies, except as to time of election and term of office.

Section 2569, *supra*, provides that "* * * county commissioners or members of board of revenue, or boards or courts of like jurisdiction * * * shall hold their respective offices for the term of four years * * *".

Section 6 of said Act No. 436, *supra*, reads as follows:

"Section 6. ELECTION AND TERMS OF MEMBERS OF COURT:

The term of the Judge of Probate as a member of said Court shall be coextensive with his term as Judge of Probate. At the regular election for State and County officers to be held on the first Tuesday after the first Monday in November 1940 there shall be elected by the qualified electors of the entire county four associate members of the Court of

County Commissioners of Wilcox County. All of the associate members of said Court shall be qualified electors of Wilcox County, and two of said associate members shall reside in that part of Wilcox County which lies on the East side of the Alabama River and be qualified electors of some precinct lying on the East side of the Alabama River, and two of said associate members shall reside in that part of Wilcox County which lies on the West side of the Alabama River and shall be qualified electors of some precinct lying on the West side of the Alabama River. In no event shall more than two of the associate members of said court at any time live on the East side of the Alabama River, and in no event shall more than two of the associate members of said court at any time live on the West side of the Alabama River. In the election of associate members of said Court, the candidates from the East side of the Alabama River and the candidates from the West side of the Alabama River shall be voted upon separately, but all of said associate members shall be voted upon by the electors of the entire county. In voting for associate members of said Court, each elector shall vote for as many candidates from the East side of the Alabama River as there are associate members to be elected from the East side of the Alabama River, and each elector shall vote for as many candidates from the West side of the Alabama River as there are associate members to be elected from the West side of the Alabama River. In the election to be held on the first Tuesday after the first Monday in November 1940 the two candidates from the East Side of the Alabama River who receive the highest number of votes shall be elected, and the two candidates from the West side of the Alabama River receiving the highest number of votes shall be elected; and the one of the two elected from the East side of the Alabama River who receives the highest number of votes and the one of the two elected from the West side of the Alabama River who receives the highest number of votes shall each serve for a term of four years, or until their successors are elected and qualified; and the other two elected shall serve for a term of two years or until their successors are elected and qualified. In case the two candidates from either side of the Alabama River receiving the highest number of votes receive the same number of votes they shall draw lots for the long and short term. After 1940 one associate member of said court from each side of the Alabama River shall be elected in each election for State and County officers held on the first Tuesday after the first Monday in November of each of the even numbered years, and each such member thereafter elected shall serve for a term of four years or until his successor is elected and qualified.

"The term of each associate member of said Court shall begin on the first Monday after the second Tuesday in January next succeeding his election. Election for successors to the associate members of said court elected in 1940 shall be governed in all respects by the provisions of this act in regard to the election of associate members of said court in 1940 in so far as the same are applicable."

Summarizing the above quoted Section 6, it appears that the Act divides Wilcox County into two parts or divisions from each of which two members of its governing body are to be elected by the vote of the entire electorate of the county; and also that the person in each division receiving the largest vote shall hold for a term of four years, and that the other person elected from such division shall hold for a term of two years, and thereafter that each member elected, after the expiration of the terms of members presently to be elected, shall hold for a term of four years, in such

wise that thereafter the entire membership of the board shall not be elected at one and the same time.

In that respect, therefore, this local act differs from the general law as to election of county governing bodies.

This situation was considered at length in an elaborate opinion in *Dunn vs. Dean*, 196 Ala. 486, 71 So. 709, wherein on page 496 it is observed:

"The local act under review has no substantial counterpart, in respect of its paramount features and purposes, in any general law to which this court has been referred, or of which it is now informed. This act's chief object and dominant purpose and effect was and is to create a county governing body different in personnel; in the selection of its personnel; in the tenure of its personnel; from that provided by the general laws for the constitution and creation of the courts of county commissioners in the state. The powers, duties, and jurisdiction of the body created by this act are practically the same as those conferred upon and required of the courts of county commissioners.

"Indeed, if the change sought to be wrought by this local act had been but an effort to alter the name of Conecuh's governing body, there would be no hesitation in pronouncing it invalid under the plain injunction of section 105 of the Constitution. But, as appears from our summary of the provisions of the local act, its purpose and effect is far greater than any mere change of name or alteration in respect of minor detail within the rule established in *City Council v. Reese*, 149 Ala. 188, 43 South, 116.

* * * *

"This departure from a body the members of which were chosen by the electorate of the whole county, and for terms of four years (aside from the judge of Probate who is chosen for a term of six years), to a body the constituents of which are elected by and from districts only, and for terms so ordered and arranged as to prevent the expiration of the terms of all the members at one time, are radical and, in proportion to the subject, superlative changes from the status fixed by general law to a status not contemplated or provided for by general laws. Our opinion, therefore, is that this act is not offensive to the quoted provisions of section 105 of the Constitution. We are advised of no provision of the Constitution that **inhabits** (sic) the Legislature from creating a county governing body as the result of elections of its members by the electorate of defined districts."

A somewhat similar situation was considered in an opinion of this office dated February 17, 1940 to Hon. O. C. Bottoms, Superintendent of Education, Etowah County, Quarterly Report Attorney General, Vol. XVIII, page 232, where it was held that Section 105 of the Constitution of 1901 did not prevent the enactment of local legislation authorizing the electors of the county to elect a county superintendent of education although under the general law such superintendent was appointed by the county board of education itself.

From the request, it appears that no opinion is desired as to the constitutionality of the local act itself. Therefore, this opinion is as to the con-

stitutionality of Section 6 of the act only, and on the authority above quoted from there can clearly be no doubt as to its constitutionality.

Inasmuch as said Section 6 is not in conflict with Section 105 of the Constitution of 1901, unless Mr. Roberts was elected, or rather nominated, as a candidate in strict accordance with the provisions of said section, he was evidently "defeated."

I have considered the act in question only in connection with said Section 105 of the Constitution. So far as appears, the act is not offensive to Section 106 of the Constitution, providing for publication of notice as to local acts, nor to Section 45, relating to the title and subject matter of acts of legislature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 4, 1940.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Licenses—Motor Vehicles—Schools—School Busses—

Amount of license which motor vehicle that is operated as a school bus, but is also operated for private purposes, should pay, discussed generally.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 11, 1940, in which you request my opinion as follows:

"This morning a man came in to buy a tag for his car that he had been operating as a school bus, and, of course, with a school bus tag. Now that school is out he wishes to use the car for private purposes and wanted a seven-months tag. I read your opinion under date of April 18, 1940 to Judge G. H. Howard, but there was nothing in it about school busses. Heretofore we have sold these tags on the monthly declining basis, but this morning I advised the man to wait until the 15th of this month and purchase a half-year tag. Would you please advise me about this?"

This office has previously held that a privately owned motor vehicle used exclusively for the transportation of school children and school teachers

to and from school, or while being used for any school purpose or any public or community purpose at the direction of, or by authority of, the Superintendent of Education having supervision over the school or schools regularly served by such motor vehicle, was exempt from the payment of motor vehicle license, but that such motor vehicle, if used for any other purpose, was not exempt from the payment of motor vehicle license. See opinions to Hon. H. G. Dowling, Superintendent, Tuscaloosa County Schools, Tuscaloosa, Alabama, under date of August 1, 1935, Biennial Report of Attorney General, 1934-36, page 258; to Hon. W. L. Pratt, Judge of Probate, Bibb County, Centreville, Alabama, under date of October 9, 1935, Quarterly Report of Attorney General, Vol. I, page 35; and to Hon. R. H. Williams, Judge of Probate, Marshall County, Guntersville, Alabama, under date of June 22, 1939, Quarterly Report of Attorney General, Vol. XV, page 320.

In an opinion to Hon. Henry S. Long, President, State Tax Commission, Capitol, under date of October 30, 1935, Quarterly Report of Attorney General, Vol. I, page 140, it was stated:

"I beg to advise that there is no liability for license on automobile (motor vehicle) until the same is actually used on the public highways."

From the above, it follows that a motor vehicle used for school purposes is not liable for motor vehicle license until it is also used upon the public highways of the State for other purposes; that when it is so used for other purposes, the amount to be collected for motor vehicle license should be figured on the same basis as if the motor vehicle had not been previously operated upon the public highways of the State of Alabama during the license year.

1. If such motor vehicle is a new or used automobile or truck and was purchased or acquired on or after November 15, but not before, motor vehicle license for the same may be purchased on a monthly declining basis. See the restatement of the holdings of the various opinions of this office on the subject of motor vehicle licenses numbered 6 in the opinion to Judge Howard referred to in your letter of inquiry.

2. If such motor vehicle is a new or used automobile or truck, but was purchased or acquired prior to November 15, motor vehicle license for the same may not be purchased on a monthly declining basis. See the restatement of the holdings of the various opinions of this office on the subject of motor vehicle licenses numbered 9 in the opinion to Judge Howard, supra.

3. If such motor vehicle is other than a new or used automobile or truck, motor vehicle license for the same may not be purchased on a monthly declining basis regardless of the date on which the motor vehicle is purchased. See the restatement of the holdings of the various opinions of this office on the subject of motor vehicle licenses numbered 8 in the opinion to Judge Howard; supra.

4. If such motor vehicle comes in the category described in paragraph numbered 1 hereinabove, the amount of motor vehicle license due on such vehicle should be figured on the monthly declining basis for the remaining months of the license year from the time it is first used for purposes other than school purposes.

5. If such motor vehicle comes within the categories described in paragraphs numbered 2 and 3 hereinabove, a full year's license for the same should be collected if it is first used for purposes other than school purposes before May 15, and a half year's license should be collected if it is first used for purposes other than school purposes on or after May 15. See the restatement of the holdings of the various opinions of this office on the subject of motor vehicle licenses numbered 10 and 11 in the opinion to Judge Howard, *supra*.

In this connection, your attention is specially called to the opinion to Judge Williams, *supra*, wherein it was held that privately owned **school busses**, used for purposes other than school purposes as above enumerated, should be licensed as **motor busses** under Subsection (a) of Schedule 158.3 of the 1935 Revenue Act, as amended by Act No. 530, H. 921, approved September 14, 1935 (General Acts, 1935, p. 1118).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 4, 1940.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses—

Where licensee operating a wood working factory, planing mill, etc. has procured the proper license for a particular classification and later becomes liable for the license in a higher classification, no credit may be allowed on the new license for the amount paid for the original license (Schedule 123 of Section 348 of Revenue Laws of 1935, as amended by Act No. 231, H. 182, approved March 2, 1937, General Acts, 1936-37, page 279 by adding Schedule 123½).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 11, 1940, in which you request my opinion as follows:

"I will thank you to give me an opinion as to the following:

"Under House Bill No. 182, extra session of Legislature 1936 and 1937, schedule 123½ of the Revenue Law of Alabama, a firm here purchased a license for a wood working factory where less than twenty men were

employed, and paid the proper license for that classification. Later this firm employed an additional number of men and did not take out a license for the additional men and were cited by the license inspector recently for twenty additional men. The State Department of Revenue suggests that I accept payment for less than forty men employed and give them credit for the amount already paid which was, as explained above less than twenty men.

"Would I be within the law in allowing this firm to pay an additional amount or in other words pay for the full number of men employed and credit them for the number already paid on.

"This matter has been hanging fire for sometime and I hope that you will give this your immediate attention."

In my opinion, there is no authority of law for allowing the firm described in your inquiry to secure the license in question by paying only an additional amount, i. e., the difference between the first license, and the higher license now required.

Schedule 123½, enacted by the Legislature of 1936-37, (Act No. 231, H. 182, approved March 2, 1937, General Acts, 1936-37, page 279) provides as follows:

"Schedule 123½. Each person, firm or corporation engaged in the operation of a veneer mill, planing mill, box factory, handle factory, or any other factory where lumber or timber is sawed or made into a finished or semi-finished product, other than a saw mill licensed under Schedule 123, shall pay a privilege tax based on the number of men employed or engaged in the manufacture of the products produced by such mills, as follows: Where there are 5 or less men employed or so engaged—\$5.00. Where there are more than 5 men and less than 10 so employed or engaged—\$10.00. Where there are more than 10 men and less than 20 so employed or engaged—\$30.00. Where there are more than 20 men and less than 40 so employed or engaged—\$80.00. Where there are more than 40 men and over—\$120.00. It is the intention hereof that where a person, firm or corporation shall pay a privilege tax under Schedule 123 or under Schedule 84, then no privilege license shall be charged or collected hereunder."

This office in an opinion rendered under date of August 25, 1936 to Mrs. Frank C. Turner, Judge of Probate, Washington County, Chatom, Alabama, Quarterly Report of Attorney General, Vol. IV, p. 150, in treating Schedule 123 of the 1935 Revenue Laws, which contains a similar provision with respect to the sawmill license, except that such license is based upon the capacity of the mill rather than the number of employees, concluded that there was no authority for allowing, on the license required for a mill which had attained a greater capacity, credit for the license issued to the owner of such mill when operating at a lower capacity.

Another opinion reaching an analogous conclusion is that rendered under date of August 28, 1936, to Hon. M. W. Forman, Judge of Probate, St. Clair County, Quarterly Report of Attorney General, Vol. IV, p. 160, wherein it was held that no credit could be allowed to a person having a nonowner driver's license for such license when he became an owner. Your attention

is also called to opinions reported in Biennial Report, 1934-36, page 158, and Quarterly Report, Vol. XV, page 83, wherein this office concluded that where a person has taken out a license and thereafter moves the business to a place in which a higher license is required, such higher license must be procured, there being no provision for a credit on the amount paid for the original license.

In view of the uniformity of the precedent set by this office in construing other statutes of a like nature, and in view of the further fact that I have found no direct authority permitting a credit on the new license of the amount paid for the original license, you are, therefore, advised that you are without authority to allow such credit.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 4, 1940.

Hon. W. H. Quillin, Judge,
Law and Equity Court,
Franklin County,
Russellville, Alabama.

Director of Public Safety—Driver's License—Revocation thereof—
Driving while intoxicated—Reinstatement of Driver's license.

Person whose driver's license has been revoked upon conviction of driving while intoxicated cannot file petition to have his license reinstated under Subsection (n) of Section 10 of Act No. 181, H. 245, approved March 18, 1939 (General Acts, 1939, p. 300).

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated May 27, 1940, follows:

"I have in mind Act No. 181 (House Bill No. 245) approved by the Governor March 18, 1939, and published in General Acts of 1939 page 300. If a defendant pleaded guilty to a charge of driving a motor vehicle upon a public highway while he was intoxicated in a circuit court of this state on May 15, 1940 and paid a fine of \$100.00 and costs and the Director of Public Safety revoked his driver's license for twelve months on May 15, 1940, is said defendant entitled to file a petition and have a hearing in a county court or circuit court of his residence as provided in subsection (n) of Section 10 of said Act No. 181, approved by the Governor March 18, 1939 and can the court on the hearing find that the license should not have been revoked and restore the license to him?"

Please let me have your opinion."

My answer to your inquiry is in the negative.

Your attention is called to Subsection (e) of Section 10 of Act No. 181, H. 245, approved March 18, 1939, page 300, General Acts, 1939, which reads as follows:

"(e) Whenever any person is convicted of any offense for which this Act makes mandatory the revocation of the driver's license of such person by the Director of Public Safety, the court in which such conviction is had shall require the surrender to it of the driver's license then held by the person so convicted and the court shall thereupon cause the same to be forwarded together with a record of such conviction to the Director of Public Safety."

Subsection (g) of Section 10 of Act No. 181, supra, reads in part as follows:

"(g) For the purposes of this Act the term 'conviction' shall mean a final conviction. * * *"

It will be noted that the term "conviction" within the meaning of this Act, means a final conviction. From the facts stated in your request, it appears that the person in question has been convicted within the meaning of the Act under consideration.

Subsection (h) of Section 10 of Act No. 181, supra, reads in pertinent part as follows:

"(h) The Director of Public Safety shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction of any of the following offenses, when such conviction has become final:
* * * 2. Driving a motor vehicle by a person who is an habitual user of narcotic drugs, or while intoxicated. * * * (Emphasis supplied)

It will be noted from the above quoted subsection that the Director of Public Safety **shall forthwith** revoke the driver's license of any person who has been convicted of driving a motor vehicle while intoxicated. The use of the words "shall forthwith" revoke such person's driver's license, in my opinion, means that it is mandatory upon the Director of Public Safety to revoke the license of any person who has been convicted of driving a motor vehicle while intoxicated.

Subsection (n) of Section 10 of Act No. 181, supra, reads as follows:

"(n) Any person denied a license or whose license has been cancelled, suspended or revoked by the Director of Public Safety **except where such cancellation or revocation is mandatory under the provisions of this Act** shall have the right to file a petition within thirty (30) days thereafter for a hearing on the matter in the County Court, Circuit Court or court of like jurisdiction in the county wherein such person resides, and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty (30) days' written

notice to the Director of Public Safety, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or subject to suspension, cancellation, or revocation of license under the provision of this Act." (Emphasis supplied)

It will be noted from the clear and unambiguous language used in the above quoted subsection that when the revocation of a person's driver's license is mandatory upon the Director of Public Safety, then such person shall not have the right to file a petition for the reinstatement of his driver's license.

You are, therefore, advised that, in my opinion, a person who has been convicted of driving a motor vehicle upon the highways of this state while intoxicated, and has had his driver's license revoked by the Director of Public Safety, does not have the right to file a petition for the reinstatement of such driver's license, as provided in Subsection (n) of Section 10 of Act No. 181, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 4, 1940.

Miss Lois L. Rainer, Director,
Public Library Service Division,
Department of Archives and History,
Capitol.

Public Service Library Division authorized to pay traveling expenses of a member of its Executive Board as delegate to American Library Association meeting in Cincinnati, Ohio.

Opinion by Assistant Attorney General Russell.

Dear Miss Rainer,

Your letter of May 23, 1940, in which you request an official opinion, is as follows:

"Attached hereto is a letter addressed to me from Hon. J. M. Bonner, Legal Adviser to the Governor, which speaks for itself.

"Your opinion is respectfully requested on the following question: May the funds available to the Public Library Service Division of the Department of Archives and History be legally expended for the purpose of defraying the expenses of one of the members of the Executive Board of Public Library Service Division as a delegate to the meeting of the American Library Association in Cincinnati, Ohio?"

In answer to your inquiry, attention is called to Section 3 of Act No. 171, H. 327, approved March 17, 1939 (General Acts, 1939, page 297), which is as follows:

"Section 3. DUTIES AND POWERS. The Public Library Service Division shall give advice to all free public, regional, city and county libraries and to all communities in the State which may propose to establish public libraries, in the manner hereinafter provided, as to the best means of establishing and administering such Public Library service; selecting and cataloging books and other details of library management; and may send any of its staff to aid in organizing such libraries, or to assist in the improvement of those already established; may advise as to the proper qualifications of librarians of free public regional, city and county libraries, and shall perform such other services consistent with and in furtherance of the purposes of this Act as shall from time to time appear feasible. Moreover, the Division shall advise as to arrangements as provided in Section 1548 of the Code of Alabama 1923, by which local governmental agencies may combine in the establishment of joint units of library service. The Division may receive and shall administer all funds, books or other property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purpose of the Act; and by the use of such means and methods as circumstances warrant the Division may acquire and operate traveling libraries and circulate or loan such books and libraries among communities, libraries, library associations, social and civic clubs and organizations and other public agencies and institutions under such conditions and rules as the Division deems necessary in order to protect the interests of the State and to increase the efficiency and promote the extension of Public Library service throughout the State."

It will be noted that Section 3, supra, in defining the duties and powers of the Public Library Service Division, provides among other things that it "shall perform such other services consistent with and in furtherance of the purpose of this Act as shall from time to time appear feasible" and also that "the Division may receive and shall administer all funds, books or other property, from whatever source, under such conditions as may be deemed necessary in order to carry out the purposes of the Act."

It is, therefore, my opinion that the powers granted the Public Library Service Division of the State of Alabama are broad enough to authorize the said Division to pay the traveling expenses of one of the members of its Executive Board as a delegate to the American Library Association meeting to be held in Cincinnati, Ohio, provided that, in the opinion of the said Division, the sending of a delegate to such a convention will be of material and in furthering and carrying out the purpose for which the Public Library Service Division was created.

Yours very truly,

THOMAS S. LAWSON,
Attorney General

June 4, 1940.

Hon. G. M. Barnett,
County Superintendent of Education,
Chambers County,
LaFayette, Alabama.

Schools—Officers—County Superintendent of Education—

The County Superintendent of Education of Chambers County is not entitled to receive as a supplement to his regular salary, or as an expense allowance, the 10% commission for handling and distributing free textbooks.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of May 18, 1940, follows:

"By an Act of the Legislature of Alabama, approved June 3, 1935 (Local Acts of 1935, page 8), provision was made for the election of a County Superintendent of Education for Chambers County, and by Section 5 of that Act it was provided that the salary of the County Superintendent of Education should not be less than \$2000.00 nor more than \$3000.00 per annum.

"In 1936 the undersigned, G. M. Barnett, in a special election, was elected County Superintendent.

"On May 7, 1936, before he assumed his duties or entered upon his office as the elected County Superintendent of Education, the County Board of Education adopted a resolution, which is as follows:

"WHEREAS, G. M. Barnett recently elected County Superintendent of Education, enters upon his new term of office on July 1, 1936, and

"WHEREAS his salary has been \$3600 per year but has been reduced to \$3000.00 per year by Local Act,

"BE IT RESOLVED by the Board in session this day that his salary for this new term to be made \$3000.00, but provided further that the 10% commission allowed for handling the State Text Books be allowed for handling the State Text Books be allowed as a supplement to his regular salary or that same be allowed for an expense account, provided he and his secretary do the work of handling these books and still further provided that he be allowed his expenses for attending N. E. A. and A. E. A. Conventions or other educational meetings of importance, if legal.

"During each of the years since July 1, 1936, the County Superintendent of Education of Chambers County has done the work of handling and distribution of the Free Text Books provided for by the Act of the Legislature of Alabama approved July 17, 1935 (General Acts of 1935),

(page 594) and has received, each year, the 10% commission allowed by the Book Depository, and referred to in the above quoted resolution.

"But upon a recent audit by State Examiners, this 10% commission was charged back to the Superintendent as an unauthorized payment by law to him.

"The handling and distribution of the free text books is nowhere, so far as I am able to find, made one of the duties of the County Superintendent of Education, by any statute, and the time and labor involved in that work was not time and labor covered by any salary limited by law and fixed by the County Board. Since the Local Law on the election of the County Superintendent of Education was signed June 3, 1935 and the State Text Book law signed July 17, 1935, this Local Law could not have anticipated this extra work imposed on the County Superintendent of Education. To see to the 'going in and out' of these text books is one of the biggest and most tedious jobs in the Superintendent's office. In addition much expense is attached to this handling and distribution of text books, borne by the County Superintendent of Education, and the County Board of Education of Chambers County, as evidenced by the above resolution, recognized these facts and provided that the County Superintendent of Education should receive and retain the 10% commission above mentioned.

"Will you please advise me whether, under the circumstances set forth, the retention of 10% commission by the County Superintendent of Education is lawful.

"I should direct your attention to an opinion touching this subject rendered by Hon. A. A. Carmichael, Attorney General, to Hon. Chas. W. Lee, State Comptroller, on October 6, 1937 (Biennial Report of the Attorney General October 1, 1936 to September 30, 1938, page 429)."

My answer to your inquiry is in the negative.

Your attention is called to an opinion of the Attorney General, Biennial Report of Attorney General, 1934-36, page 263, which opinion holds that elective county superintendents of education whose salaries are fixed by local law are not entitled to receive any salary in excess of that fixed by the local law, or an expense account. In this connection, I call your attention to the case of **Woodruff v. Beeland**, 220 Ala. 652, 127 So. 235, which is cited in the opinion of the Attorney General hereinabove referred to, in which the Supreme Court, in speaking of the authority of a county board of education to make an expense allowance to an elective county superintendent of education, said:

"This is a mandamus proceeding to test the power of the board of education of Butler County to make an expense allowance of \$62.50 per month to the county superintendent of education in addition to his salary fixed at the same time and at the maximum authorized by law.

"By a local law, approved August 23, 1927 (Loc. Laws 1927, p. 258), the office of county superintendent of education of Butler county was made elective. By the act the salary is fixed by the county board of edu-

cation, but not less than \$1,800 nor more than \$3000.00 per annum. The duties and powers of the office are declared the same as provided by general law.

"Upon the election of petitioner at the November election, 1928, the county board of education ordered that he be 'paid a salary of \$3,000.00 with \$750.00 expense money per year.' * * *

"The county treasurer of school funds, upon certified pay rolls provided by law, paid the monthly salary, but declined to pay the expense allowance; hence this suit. * * *

"An administrative board or other agency, the creature of legislation, has only the powers conferred by its creator. Every such board charged with the duty of devoting public funds to ends prescribed by law must point to a 'thus saith the law' for every disbursement.

"Unless a given charge on such fund is expressly or impliedly authorized, it cannot be lawfully incurred.

"No such power is implied unless an intention to confer it can be seen from the entire scheme of legislation; implied because incident to, and embraced within, express powers. * * *

"Under the law, the county board of education may, in its discretion, provide certain assistants to the county superintendent, including clerical help; is required to furnish office quarters, furniture, office equipment, stationery, postage, forms, and supplies. School Code, 1927, Section 169.

"These may be termed perquisites of the office. They do not include, and no law mentions, an expense allowance of this character. We need not decide whether or not this allowance is a part of the salary. * * *

"But, if this allowance be reckoned as part of the salary, it is beyond the maximum fixed by law.

"If not salary, no law empowers the board of education to make it."

I am unable to find any authority of law, either express or necessarily implied, vesting the county board of education of your county with the power to allow you, as county superintendent of education, any part of the 10% commission referred to in your said request, either as a supplement to your regular salary, or as an expense account.

The opinion referred to in your request, which appears on page 429 of the Biennial Report of the Attorney General, 1936-38, is distinguishable from the question here presented in the following:

The resolution adopted by the board of education of Perry County which was considered in the opinion appearing in the 1936-38 Biennial Report of the Attorney General, *supra*, allowed the 10% commission to the county superintendent of education as "an office expense"; whereas, the resolution adopted by the county board of education of Chambers County attempted

to allow this 10% commission to you, either as a supplement to your regular salary, or as an expense account.

If the resolution of the county board of education of Chambers County set out in your letter of inquiry could be considered a contract which the county board of education had entered into with you for the performance of services which were not part of your official duties, then such contract would be contrary to public policy and void. See opinion of the Attorney General in Quarterly Report, Volume XII, page 73.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 4, 1940.

Hon. Walter B. Jones, Director,
Department of Conservation,
Montgomery, Alabama.

Forests, woods, burning of—Justices of the Peace—

Justice of the Peace has final jurisdiction of violation of Act No. 492, S. 347, approved September 22, 1939, General Acts, 1939, Pamphlet Edition, page 711.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of May 11, 1940, in which you request my opinion as follows:

“Re: Request for Opinion Regarding Authority of Justices of the Peace to try cases brought under an Act of the Alabama Legislature approved Sept. 22, 1939 (No. 492-S. 347-Holmes)

“The question has arisen in several instances where cases have been brought or attempted to be brought into Justice of the Peace courts of Alabama for violations of a recent forest fire law passed by the Alabama Legislature and approved September 22, 1939 (No. 492—S-347—Holmes) as to whether or not the Justices of the Peace have jurisdiction over such cases.

“Whereas it is not specifically set out in this Act that the Justices of the Peace shall have jurisdiction over forest fire cases arising under the above cited Act, I cite you Chapter 142 of the 1923 Code of Alabama, which pertains to the forest fire laws of this State, and more particularly

Section 4116 of said Code which confers jurisdiction of all violations under Chapter 142 upon the Justices of the Peace.

"In your opinion would the new fire law above cited by considered an amendment to Chapter 142 so as to confer jurisdiction upon Justices of the Peace to try violations under this Act?"

It is my opinion that your inquiry should be answered in the affirmative.

Sections 4110-4113 are the exclusive criminal sections of the 1923 Code dealing with wilfully and negligently setting on fire or causing to be set on fire any woods, forests, etc. Section 4116 of the 1923 Code provides that justices of the peace shall have final jurisdiction to hear and determine all cases and prosecutions originating under the provisions of this Chapter.

Act No. 492, S. 347, approved September 22, 1939, General Acts, 1939, Pamphlet Edition, page 711, is a complete rewrite of the law relating to one who wilfully, maliciously, or with wanton negligence sets on fire any woods, etc., or who wilfully, maliciously or wantonly allows fire to spread to the lands of another; or who burns any woods, etc. either his own or another's, without taking necessary precautions to prevent damage being done to the property of others. The 1939 Act, *supra*, provides the punishment for violation of any of the provisions of the Act and then further provides other things not here material.

In my opinion, the 1939 Act, *supra*, was evidently intended as a substitute for Sections 4110-4113 of the 1923 Code. The offenses as defined by Sections 4110-4113 were clearly, under authority of Section 4116, triable before justices of the peace. The 1939 Act, *supra*, makes no reference to the question of jurisdiction and is entirely consistent with the retention of Section 4116 in the law. Upon the question of jurisdiction no conflict whatsoever arises, and, therefore, under the general rules of construction, Section 4116 remains in force and effect and violations of the 1939 Act, *supra*, are triable before justices of the peace, the same as were violations of Sections 4110-4113 prior to the pro tanto amendment to Chapter 142 of the 1923 Code by the 1939 Act, *supra*. *Pharr v. Whittle*, 237 Ala. 124; 185 So. 895.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 5, 1940.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Bastardy Proceedings—

A county is without authority of law to pay the expenses of transporting a person charged with bastardy from one county to another county where the offense was committed for trial.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 24, 1940, in which you request my opinion as follows:

"I have a bill before me filed by the Sheriff of the County, for transporting a prisoner, charged with bastardy from Mobile County back to Clarke.

"Please advise me if this is a proper charge against the County Treasury."

My answer to your request is in the negative.

A prosecution for bastardy is neither strictly civil nor strictly criminal, but partakes of the nature of both, and is rather of a quasi criminal nature.

I call your attention to the case of **Shows v. Solomon**, 91 Ala. 390, and especially to that part of this opinion where it says:

"It is instituted by affidavit and warrant of arrest; preliminary investigation is had before a committing magistrate, and the case is sent up to the Circuit Court for trial, if the testimony justify it; and defendant gives bail for his appearance, as in criminal cases. To this extent, the procedure assimilates itself to that of a criminal prosecution; but it is neither a case for the grand jury, nor is it, in this proceeding, prosecuted as an offense against the peace and dignity of the State. If, on trial in chief, defendant is convicted, no fine is imposed on him. The sentence is, that he pay the costs, and enter into bond conditioned to pay not exceeding fifty dollars a year, as the court may order, for the period of ten years, 'for the support and education of the child.'"

See **Dargan v. State**, 72 Ala. 173; **State ex rel, Hunter**, 67 Ala. 81; **Smith v. State**, 73 Ala. 11.

I now call your attention to Section 3438, Code of Alabama, 1923, which provides that in event the complainant "the mother" fails in her case, she must pay the costs of the proceedings and judgment must be rendered against her for the same. This Section is as follows:

"3438. Complainant pays cost on verdict for defendant.—In case the issue provided for by section 3425 (6373) is found against the complainant, judgment for costs must be rendered against her."

I now call your attention to the case of **Berryman v. the Judge of the County Court of Lawrence County**, 9 Ala. 455. This case lays down the following rule and says as follows:

"We cannot doubt the liability of the party to pay the cost, on whom the paternity of a bastard child is established by judgment. In all civil

actions, the unsuccessful party is entitled to full cost unless the law otherwise directs. So in qui tam actions, in suits in the nature thereof, the party prevailing in the suit shall be entitled to recover costs as in other actions at law. Again the woman making the complaint in a case of bastardy, if she fails to make it good, is made liable for costs."

The question might arise, as bastardy is not strictly a criminal case, can the defendant be sentenced to hard labor on failing or refusing to make the bond as provided by Section 3428, Code of Alabama, 1923? Can a person be sentenced for debt. In bastardy proceedings the reputed father is not sentenced for failure to pay the debt assessed against him but for failure to perform a duty, a duty placed on him by the State. **Paulk v. State**, 52 Ala. 427.

We see from the above while the trial in all respects is conducted as are criminal cases, the enforcement of any judgment entered against the reputed father for support of the bastard child, and the cost of the proceedings; or if the mother who makes the complaint fails in her suit, the collection of such judgment must be collected as any other civil judgment. For further proof of this, such costs can never be a charge against the fine and forfeiture fund of the county. See opinion of the Attorney General, Biennial Report of Attorney General, 1930-32, 665.

Therefore, it is my opinion that neither the State nor the County is liable for the costs of conveying or transferring a prisoner charged with bastardy from one county to another for trial but such charges become a part of the costs and are paid on conviction by the defendant, and in case of acquittal, by the mother of the bastard child.

I wish to call your attention to two opinions of this office, one written to Hon. W. A. Leland, January 6, 1923, Biennial Report of the Attorney General, 1926-28, page 407, the other written to Hon. Hamp Draper, Associate Member of the Board of Administration, March 23, 1928, Biennial Report of the Attorney General, 1926-28, page 480, which heretofore have been overruled in the opinion found in Biennial Report of the Attorney General, 1930-32, page 665, supra.

I call your attention to Section 3428, Code of Alabama, 1923, which is as follows:

"Section 3428. Judgment on failure to give bond. — On failure to give such bond, the court must render judgment against the defendant for such sum as, at legal interest, will produce the amount directed to be paid yearly; and he must also be sentenced to hard labor for the county for one year, unless in the meantime he executes the bond required, or pays the judgment and costs. If the defendant is sentenced to hard labor, the proceeds of his hire or labor shall be paid to the judge of probate for the support and education of the child, as is provided in section 3427 (6376) of this Code."

You will note nothing above is stated about any sentence for costs but simply says "and he must also be sentenced to hard labor for the county for one year." So if it is one year and only one year, no additional time can be added for costs. I realize it would be different if the defendant were convicted of a criminal offense which was a misdemeanor.

I call your attention to Section 5290, Code of Alabama, 1923, which is as follows:

"Section 5290. On default in payment of fines and costs, imprisonment or hard labor imposed. — If the fine and costs are not paid, or a judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail or, at the discretion of the court, sentenced to hard labor for the county as follows: If the fine does not exceed twenty dollars, ten days; if it exceeds twenty dollars and does not exceed fifty dollars, twenty days; if it exceeds fifty and does not exceed one hundred dollars, thirty days; if it exceeds one hundred and does not exceed one hundred and fifty dollars, fifty days; if it exceeds one hundred and fifty, and does not exceed two hundred dollars, seventy days; if it exceeds two hundred and does not exceed three hundred dollars, ninety days; and for every additional one hundred dollars, or fractional part thereof, twenty-five days."

The above section applies to criminal cases which are misdemeanors where the defendant is sentenced to hard labor and you will note particularly the following:

"If the fine and costs are not paid or judgment confessed according to the provisions of the preceding section, the defendant must either be imprisoned in the county jail or, at the discretion of the court, sentenced to hard labor for the county as follows: If the fine does not exceed twenty dollars, ten days; if it exceeds twenty dollars and does not exceed fifty dollars, twenty days; if it exceeds fifty and does not exceed one hundred dollars, thirty days, etc. * * *"

Again I call your attention to Section 5291 of the Code. This section provides:

"Section 5291. When additional hard labor imposed for costs; rules in reference to. — If, on conviction, judgment is rendered against the accused that he perform hard labor for the county, and if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period, not to exceed ten months, as may be sufficient to pay the costs, at the rate of seventy-five cents per day. * * *"

The premises considered, it follows that your inquiry should be answered in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 5, 1940.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

When a defendant is convicted in the circuit court of this state and such case is bailable and the court makes an order setting the defendant's bail, on notice of intention to appeal, it is the duty of the clerk to approve such bond.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 29, 1940, in which you request my opinion as follows:

"In a criminal case where Defendant gives notice of appeal from a conviction in the Circuit Court and the Court suspends execution of sentence pending the appeal and fixes the amount of the appeal bond we will say at Five Hundred Dollars is it the duty of the Clerk or the Sheriff to approve said appeal bond?"

It is the duty of the clerk of the circuit court to approve the appeal bond in a criminal case where the defendant is convicted and gives notice of the appeal upon which notice the execution of the sentence is stayed pending such an appeal, and bond is fixed by the presiding judge. I call your attention to Sections 3241 and 3256, Code of Alabama, 1923, which are as follows:

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"Section 3241. In case of felony, judgment rendered and execution suspended pending appeal; bail on appeal.—When any question of law is reserved in case of a felony, and it shall be made known to the court that the defendant desires to take an appeal to the supreme court, judgment must be rendered against the defendant, but execution thereof must be suspended pending the appeal and the defendant held in custody, but if the sentence is for a term not exceeding ten years the judge must direct the clerk of the court in which the conviction is had to admit the defendant to bail in a sum to be fixed by the judge with sufficient surety, conditioned upon his appearance at the next term of the court and from term to term thereafter, to abide such judgment as may be rendered on the appeal, and the provisions of this section shall also apply to convictions already had. All proceedings for forfeiture of bail and arrest under this section shall be had and conducted as is otherwise provided in this Code for such proceedings."

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"Section 3256. Defendant's bail on appeal.—If the conviction is for an offense which is not punished capitally or by imprisonment for a term not exceeding ten years the judge or court must also direct the clerk of the court in which conviction was had to admit the defendant to bail in a sum which may be prescribed by the court with sufficient sureties conditioned for his appearance at the next session of the court in which the conviction was had and from session to session thereafter, to abide such judgment as may be rendered on the appeal."

You will note the above sections provide among other things:

"* * * the judge must **direct the clerk** of the court in which the conviction is had to admit the defendant to bail in a sum to be fixed by the judge with sufficient surety * * *" (Emphasis supplied)

This places the duty of approving such bond on the clerk and not the sheriff as the clerk is ordered to **"admit the defendant to bail."**

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 5, 1940.

Hon. Frank M. Johnson,
Judge of Probate,
Winston, County,
Double Springs, Alabama.

Official Bonds — Winston County—

Premiums on official bonds of Highway Board and Secretary to Highway Board of Winston County held payable from general funds of said county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 13, 1940, in which you request my opinion as follows:

"Please give me your official opinion on the following:

"In 1939 under Act No. 333, page 221 of the 1939 acts, the Legislature created and established in this County what is known as the Highway Board, which required the Secretary to make bond in the amount of \$5,000.00. The entire Board has made bond as members of said board.

"Under this Act would the Court of County Commissioners be required to pay the premiums of these official Bonds out of the General Fund of the County?

"Since the bill provides for paying the salary of the Secretary and members, as well as paying for the proper books and supplies for the Board, it just appears to me that they would be required to pay the premiums on their bonds. I will appreciate your opinion on this matter."

In reply, I wish to advise you that it is my opinion that the duty to pay for the premiums upon the bonds of the county officers and employees named by you, rests upon the county.

I wish to call your particular attention to Section 4 of Act No. 333, H. 815, approved September 5, 1939 (General and Local Acts of 1939, page 221), wherein it is provided in part as follows:

"Before entering on his duties, the said Secretary must give bond with at least two good and sufficient sureties in the sum of \$5,000.00, payable by law, for faithful performance of his duties, said bond to be approved by the Chairman of said Board and said bond to be filed and recorded with the Judge of Probate of said County. * * *"

I find no other provisions in the above named act of 1939 requiring or providing for a bond to be made by any of the named officials therein, and no provisions for the payment of the premiums on any bond. I wish, however, to further refer you to Section 9 of the above named act, which provides as follows:

"All laws and parts of laws, local, special and general, in conflict herewith are hereby repealed."

I wish to further refer you to Act No. 191, H. 344, approved April 20, 1933 (General and Local Acts, 1933, page 203), which act is generally known as the Bains Act. Sections 1, 15 and 20 thereof provide as follows:

"Section 1. That all county officials, as set forth in this Act, of all counties in this State shall be required to execute official bonds payable to the State of Alabama for the faithful performance of their duties, and such additional official bonds as from time to time the public interest may demand and as required by the provisions of law."

"Section 15. The bonds of all other County Officers in Counties where such officers are created by special or local act or acts of the Legislature, or by general acts having application to particular Counties coming within the provisions of such acts, and where the amount of official bonds to be given is provided for in said act or acts shall be of the amount so provided in said act or acts, and where not so specifically provided shall be in such an amount as in the judgment of the Court of County Commissioners, Board of Revenue or other like governing body of each of such counties is sufficient to secure and safeguard any and all public moneys or whatsoever nature coming into the hands of such officers by virtue of said offices."

"Section 20. The premiums on all bonds provided for in this Act, when made by surety companies, shall be paid by the respective counties out of the general funds of said county, except that the premiums on the bonds of Superintendent of Education and of County Treasurer of public school funds shall be paid by the Board of Education of said County out of the three mill school tax and the premiums on all bonds of \$1000.00 or less shall be paid by the officer making said bond."

In my judgment, the above quoted provisions of the Bains Act are not in conflict with the act of 1939 above named. It is, therefore, my opinion

that since the above named act of 1939 provided for the repeal of provisions of other laws in conflict with the 1939 act, only, the above quoted provisions of the Bains Act of 1933 are not repealed in so far as the same apply to Winston County, there being no conflict between the named provisions of the two acts.

I wish to further refer you to an opinion of the Attorney General reported in Quarterly Report of Attorney General, Vol. II, page 29, addressed to Hon. J. A. Keller, State Superintendent of Education, under date of January 10, 1936.

It is further my opinion that the bonds of the members of the Highway Board here considered should be made payable to the State of Alabama and should be in such amounts as, in the judgment of the Court of County Commissioners, is sufficient to secure and safeguard any and all public moneys of whatsoever nature coming into the hands of such officials by virtue of their offices. I wish to refer you to Section 15 of the Bains Act, above quoted.

It is my opinion that the premiums on all of the bonds named by you should be paid from the General Fund of Winston County, as provided for in Section 20 of the above named Bains Act, quoted supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 5, 1940.

Hon. Jas. B. Little,
Commissioner of Building & Loan,
Department of Commerce,
Montgomery, Alabama.

Notary Public — An officer of a savings and loan association, who is also a notary public, authorized to take acknowledgments of instruments in which such association is interested.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated May 14, 1940, follows:

"An officer of a Savings & Loan Association, operating under the Savings & Loan Act, approved September 21, 1939, has asked to be advised whether an officer of the Association may take the acknowledgment or proof of any instrument in which the Association is interested. Section 41 of the Savings & Loan Act specifically permits a member or an employee of an Association to take these acknowledgments, and I would

appreciate your opinion on whether a Notary Public, who is also an officer of an Association, may take these acknowledgments or proofs."

In my opinion, a notary public who is an officer of a savings and loan association operating under the provisions of Act No. 459, H. B. 770, approved September 21, 1939 (General Acts, 1939, page 616), is qualified to take the acknowledgment or proof of an instrument in which the association is interested. This authority is specifically granted by the terms of Section 41 of said Act No. 459, supra, which section is as follows:

"Section 41. PUBLIC OFFICERS AS MEMBERS. No public officer qualified to take acknowledgments or proofs of written instruments shall be disqualified from taking the acknowledgment or proof of any instrument, in writing, in which an association is interested by reason of his membership in or employment by an association so interested, and such acknowledgments or proofs heretofore taken are hereby validated."

In the absence of such express statutory authority it is my opinion that such officer would not be authorized to take such acknowledgment if he was financially interested in the association in some capacity other than as an officer or employee. **Hayes v. Southern Home Building & Loan Association**, 124 Ala. 663, 26 So. 527; **Monroe v. Arthur**, 126 Ala. 362, 28 So. 476; **Walker v. Baker**, 199 Ala. 130, 74 So. 368; **Becker Roofing Co. v. Farmers & Merchants Bank of Piedmont, et al.**, 223 Ala. 132, 134 So. 635.

The rule laid down in the above cited cases does not apply to a notary public or other officer authorized to administer oaths who is a mere officer or employee of the corporation. **Jones, et al. v. First National Bank of Ashland**, 236 Ala. 606, 184 So. 168.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 5, 1940.

Hon. W. S. Coleman,
Chairman, Board of Commissioners,
Calhoun County,
Anniston, Alabama.

County Board of Education — Authority to contribute to municipal street improvement projects—

1. Municipal corporation has no authority to levy a special assessment against public school property for local street improvement.

2. County board of education, may, however, legally contribute to the cost of such street improvement project to the extent of said projects worth and value to the public school property.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 24, 1940, in which you request my opinion as follows:

"I would like to have your opinion as to whether or not the County Board of Education can legally pay to the City of Anniston an assessment for local improvements to property belonging to the County Board of Education. The property involved is the county garage in which school buses, etc. are kept.

"In this case, the County Board of Education has paid the city the assessment assessed against their property. They are now making an effort to have the city refund them the amount of money paid to the city for improvement assessments."

This office has many times held that municipal corporations are not authorized to make special assessments against public school property to pay the cost of construction of local improvements. Biennial Report of the Attorney General, 1926-28, p. 226; Biennial Report of the Attorney General, 1928-30, pp. 192, 318, and 895; Volume 14, Quarterly Report of the Attorney General, p. 19; also Office Edition Book No. 4, pp. 44 and 81. This conclusion has also been reached in effect by the Supreme Court of this State in **Smith v. Franklin County**, 221 Ala. 136, 127 So. 904, and **City of Huntsville v. Madison County**, 166 Ala. 389, 52 So. 326.

However, this office, following the Supreme Court, has held that there appears no reason why the County Board of Education, in the execution of the authority conferred upon it, may not cooperate with a municipality by joining in projects calculated to effect an improvement or benefit to county school property. (See Quarterly Reports of the Attorney General, Vol. 14, p. 19, and Vol. 18, p. 196, and **Town of Eutaw v. Coleman**, 189, Ala. 164, 66 So. 464.)

The opinion in Quarterly Report Vol. 14, p. 19, is particularly applicable to the instant situation, and the language used therein is hereinafter paraphrased in advising you.

In **State v. County Board of Education of Russell County**, 214 Ala. 620, 108 So. 588, it was held that county boards of education have very broad discretion in the administration and supervision of public schools and educational interests of the county. Control over the property of the public schools of the county is vested in the county board of education by Section 95 of the Alabama School Code of 1927, and by Section 98 of said School Code it is provided that the county boards of education shall exercise control and supervision of the public school system of the county and shall seek in every way to promote the interests of the schools under its jurisdiction.

There can be no doubt but that the county board of education, upon finding the approach to the county garage to be in such condition as to interfere with convenient access thereto, could remedy such defects, if such

approach belonged to an individual. It naturally follows, applying the reasoning set forth in *Town of Eutaw v. Coleman*, supra, that the county board of education might cooperate with the municipality having control of the street by joining with it in a project which would naturally result in an improvement of the approach to such garage owned by the school system.

It is to be kept in mind, however, that the amount of the assessment imposed by the municipal authorities against the public school property, in the proceedings for the local improvement, is not the criterion by which the amount of the contribution of school funds to the cost thereof is to be determined. The fact that the municipal assessment was fixed at a certain amount does not necessarily mean that the improvement is of that worth or value to the public school property. (Cf. Quarterly Report, Vol. 14, p. 19, supra).

You state in your inquiry that the county board of education has paid the city the assessment fixed against the property in question, but is now making an effort to have the city refund to it the amount of money paid to the city for such assessment. If the county board of education, in determining that it should pay the city the assessment in question, ascertained that the reasonable value of the facilities afforded to the public school property by such paving was equivalent to the amount of such assessment, and such Board further determined to make a voluntary contribution for such purpose, then, in my opinion, such payment by the county school authorities, under the authority supra, was justified.

If, however, the county board of education caused the assessment to be paid without regard to the relative value of the improvement to the school property, or paid the assessment as such, then, such payment was illegal to the extent which such assessment exceeded the value of the improvement to the public school property.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

June 7, 1940.

Health — State Department of Public Health held not authorized to require keeper of market in a locality where running water is not available, to install a running water system, if, in fact, he uses an ample supply of water from a source and of a quality which meets the requirements of the State Department of Health.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 25, 1940, in which you request my opinion as follows:

"We have a merchant in a small town in this county that operates a market. He does not have running water in his building nor does the town have a water system. Can he operate this market by using water that measures up to the standard required by bringing same into his place of business by bucket or other conveyance or can the Health Department require him to install a running water system. He does not have any additional property whereby he could install a pump and pipe line to furnish this market with running water."

In reply, I wish to advise you that your question requires consideration of the regulations governing the "Manufacture, Preparation, Display and Service of Foods, Confections and Beverages" published as a bulletin of the Alabama State Board of Health. For your convenience, I quote the pertinent provisions of the above named rules and regulations of the State Department of Health, which, when duly passed in accordance with the provisions of law, have the full force and effect of law. See Code of Alabama, 1923, Section 1051(6), and the cases of **Wheeler v. River Falls Power Co.**, 215 Ala. 655, 111 So. 907, **Parke v. Bradley**, 204 Ala. 455, 458, 86 So. 28.

Section 2, Subsection (3) of the above named regulations of the State Health Department provides as follows:

"Every food establishment operated in this State, or the products of which are sold, displayed or served in this State, shall comply with the following specifications pertaining to physical structure, arrangement, appurtenances, and facilities: * * *

"(E) It shall be provided with an ample supply of water from a source and of a quality which meets the requirements of the State Department of Health. (U. S. Treasury Department Standards for Drinking Water)"

In my opinion, the operator of the market named by you may operate this market by using water that measures up to the standards required by bringing an ample supply into his place of business by bucket or other conveyance, and is not required to install a running water system.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 7, 1940.

Hon. H. B. Hamner,
Superintendent of Education,
Russell County,
Phenix City, Alabama.

Schools — Counties—

County is liable for necessary supplies furnished custodian of county school funds. School checks used by said custodian in his official capacity are necessary supplies.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 27, 1940, in which you request my opinion as follows:

"The bank as the depository of Russell County School Funds has presented the Russell County Board of Education a bill for the printing of the school checks used by the Custodian of School Funds in expending Russell County School Funds. Is it legal to pay this bill out of school funds. If not, would it be legal for it to be paid by the County Commission out of county funds?"

In answer to your inquiry it is my opinion that the bill in question is payable by the county governing body and should not be paid from school funds.

An opinion of this office found in Quarterly Report of the Attorney General, Vol. IX, at page 28, held that the county is liable for the cost of necessary supplies furnished the custodian of county school funds under Section 169 of the School Code of 1927, which provides in pertinent part as follows:

"* * * the County Board of Revenue or Court of County Commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the County Superintendent of Education and his assistants."

On the authority of the above cited opinion, it is my judgment that the cost of printing the school checks used by the custodian of county school funds in his official capacity is payable by the county. Said checks, in my opinion, are necessary supplies within the meaning of Section 169 of the School Code of 1927, *supra*.

I find no specific provision of law authorizing the payment of the bill in question out of school funds. Since there is no such specific authority, the specific mandate of Section 169 of the School Code, *supra*, should be followed. Cf. Quarterly Report of Attorney General, Vol. I, page 174.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 8, 1940.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Tax Collectors — Sale of Personal Property for Taxes—

Where a tax assessor is informed that a person has sold substantially all of his personal property, and the collection of taxes whether due or not, is endangered by such sale, then the tax collector is authorized under the provisions of Section 186 of Revenue Act of 1935 to levy on and sell any personal property of such taxpayer located within the State.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated May 28, 1940, follows:

"We have an assessment on personal property assessed to a certain construction company here in this county. This assessment was made by the owner. It is my understanding he has disposed of all of the equipment and has locked his residence and left the state, leaving the key of his residence with one of his neighbors. All of his household furniture is still here locked up in his residence but it has not been assessed.

"Do I have authority to levy on this household furniture for the taxes of his construction company? If I do have authority to levy on this furniture, in what way would I go about getting into the house? Could I request this neighbor to turn the keys over to me or would I have to get the sheriff to get the property for me? What would happen if this man's wife claims this furniture?"

I have been advised by you over the telephone that the property of the construction company referred to in the above request was owned by an individual doing business as an individual in your county.

My answer to your first inquiry is in the affirmative.

Section 186 of the Revenue Act of 1935 reads in pertinent part as follows:

"Section 186. It shall be the duty of the tax collector, whenever upon information or otherwise he has good reason to believe that any person owing taxes, whether due or not, is about to leave or remove his property from the county, or that such person is closing out or going out of business or disposing of substantially all of his personal property and thereby the collection of such taxes is endangered, to make out and certify to the judge of probate a bill against such person for the amount of such taxes and any fees due the assessor or collector; and upon the approval thereof by the judge of probate in writing endorsed thereon,

such bill shall operate as a writ of fieri facias which the collector is authorized to execute by levy and sale, in the same manner as sheriffs are authorized to execute such writs when issued out of the Circuit Court. Said writ may be executed in any county of the State where property of the taxpayer is found. * * *

It will be noted from the above quoted section that if the collection of taxes whether due or not due, is endangered by the taxpayer leaving the county or disposing of substantially all of his personal property (and the facts stated in your letter of inquiry show that this taxpayer has done both), then the tax collector may make out and certify to the judge of probate a bill against such person for the amount of the taxes due, and upon approval of such bill by the judge of probate in writing endorsed thereon, such bill shall operate and have the force and effect of a fieri facias, and the tax collector is authorized to execute such writ by levy and sale in the same manner as sheriffs are authorized to execute such writs issuing out of the Circuit Court. Biennial Report of Attorney General, 1932-34, pages 154, 582. For your information, the procedure for levy of execution issuing out of the Circuit Court is found in Code Sections 7812 to 7825 of the Code of Alabama, 1923, inclusive.

You ask in the above request, in what manner should you go about getting into the house in which the furniture is stored. I suggest that you call the attention of the person who has the keys to the house to the fact that the lien for State and county taxes under the law of this State is superior to all other liens, and request that he turn such keys over to you. In the event the person who has the keys refuses to turn such keys over to you, then you are authorized to use such force as is reasonably necessary to gain entrance into the house in which the furniture is stored. Cf. Quarterly Report of Attorney General, Vol. VIII, page 325.

You next ask, what would happen if this man's wife claims this furniture?

Of course, if the taxpayer's wife in truth and fact owns the furniture in question, this furniture could not be sold for the payment of taxes due from the husband.

I do not deem it necessary to prepare any form of execution to be used by you in connection with the levy on this property. The wording of Section, 186, supra, is clear and plain, and no specific form of levy is presented therein. In my opinion, if you simply make out a bill stating the amount of taxes due from such person, certify such bill to the judge of probate, and secure his endorsement thereon, the provisions of Section 186, supra, will be fully complied with.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 8, 1940.

Hon. Alex Brantley,
Judge of Probate,
Pike County,
Troy, Alabama.

Counties — Officers—

Probate Judge, who is also Chairman of the Board of County Commissioners, and has been designated the official to draw warrants and issue purchase orders for the county, does not violate Section 5024 of the Code of 1923, as amended, by issuing purchase orders to a corporation of which he is a stockholder.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of June 3, 1940, in which you request my opinion as follows:

"I will greatly appreciate it if you will give me your official opinion on the following:

"1. Is a Probate Judge, who is also Chairman of the Board of County Commissioners, and has been designated by the Board to draw warrants under the Budget Act, and to issue purchase orders under the Uniform System of Accounting Act, liable under Section 5024 of the 1923 Code for issuing purchase orders to a corporation in which said Probate Judge might be a stockholder?"

In answer to your inquiry, I wish to advise that I find no objection to a probate judge issuing purchase orders to a corporation of which he is a stockholder, even though he is chairman of the Board of County Commissioners and has been designated by said board as the proper county official to draw warrants and issue purchase orders for his county.

In the case of **Navco Hardwood Company v. Bass**, 214 Ala. 553, 108 So. 452, it was held:

"A corporation is a distinct entity to be considered separate and apart from the individuals who compose it;"

Therefore, applying the above principle of law to the facts presented in your inquiry, it is my opinion that a probate judge does not violate Section 5024 of the Code of Alabama, 1923, as amended by Act No. 193, H. 300, approved March 2, 1937 (General Acts of Alabama, Extra Session, 1936-1937, page 225), when he issues purchase orders to a corporation of which he is a stockholder, as he is not pecuniarily interested in such transaction so as to come within the inhibitions of said section.

See the following opinions of this office:

Opinion to Hon. M. W. Forman, Judge of Probate, St. Clair County, Ashville, Alabama, dated July 20, 1939, Quarterly Report of Attorney General, Vol. XVI, page 65; opinion to Hon. W. H. Holcombe, Sheriff, Mobile County, Mobile, Alabama, dated September 5, 1939, Quarterly Report of Attorney General, Vol. XVI, page 208; opinion to Hon. J. H. Crow, Chairman, Morgan County School Board, Decatur, Alabama, dated October 1, 1939, Quarterly Report of Attorney General, Vol. XVII, page 6; opinion to Hon. Albert S. Towle, Member, Board of Revenue and Road Commissioners, Mobile County, Mobile, Alabama, dated October 9, 1939, Quarterly Report of Attorney General, Vol. XVII, page 48.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 8, 1940.

Hon. R. F. Lyon,
Treasurer, Shelby County,
Columbiana, Alabama.

County Treasurer—

Under provisions of Act No. 60, H. 366, approved March 10, 1933 (General Acts, 1933, p. 51) where the county treasurer makes application to the Board of Revenue of Shelby County to designate a depository and such Board of Revenue designates a depository, then such officer is not liable for a loss of the funds deposited therein occasioned by defalcation, robbery or other cause attributing to the insolvency or failure of such depository.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of April 24, 1940, in which you request my opinion as follows:

"Replying to your letter of February 21st, 1940, which was a reply to my letter to you of February 12th, I beg to advise that the loss or dissipation of funds deposited by me as Treasurer are those which might be embezzled or stolen by a bank official, or which might result from the robbery of the bank.

"Of course, if the bank becomes insolvent or fails, I am relieved of liability. As stated in the concluding paragraph of my letter to you of February 12th, 1940, I have been laboring under the impression that when funds were deposited by me in a County designated depository bank, I will be under no further liability, civilly or criminally.

"I have taken no bond of any kind from the Columbiana Savings Bank and the Board of Revenue of Shelby County, which designated Columbiana Savings Bank, has not seen fit to require any bond.

"As stated, if the Bank becomes insolvent or fails the statute, as I understand it, takes care of me, but I want particularly to know if there are any other contingencies in which I would not be taken care of, or where I would be civilly or criminally liable for said County or other funds deposited by me in the depository bank.

"The deposits I make are far in excess of that guaranteed by the Federal Insurance Corporation, and if I take no bond to cover the excess I desire to know if I am civilly or criminally liable, provided the bank is one which has been designated as the County depository by the Board of Revenue."

The 1933 Act to which you refer is Act No. 60, H. 366, approved March 10, 1933 (General Acts, 1933, p. 51). Section 2 provides as follows:

"Section 2. Upon the application of the County Tax Collectors, County Treasurers, Probate Judges, Circuit Court Clerks, and/or Registers of the Circuit Court, it shall be the duty of the Court of County Commissioners, Boards of Revenue, or other like governing body of the County to appoint a bank or trust company as a depository in which such officers may deposit monies coming into their hands as such officers; which appointment shall be by proper resolutions spread upon the minutes of such court, Board of Revenue or other governing body. Such court shall from time to time by resolution spread upon its minutes, make such requirements as may be deemed necessary for the safety of such funds so deposited, not inconsistent with the general laws of the State."

Section 4 provides:

"Section 4. If any of such funds are dissipated or lost by reason of the insolvency or failure of such bank or trust company appointed as such depository as provided in Sections 2 and 3 hereof, such dissipation or loss shall not constitute a liability on the official bond of such officers nor a liability on the sureties thereon."

Section 6 has been amended but not here material.

In my opinion, if the Board of Revenue of Shelby County designates the Columbiana Savings Bank as the depository and you deposit the funds of the county in such bank, you are relieved from all liability in the event the bank becomes insolvent or fails because of the loss or dissipation of such funds or in the event such funds should be embezzled or stolen by a bank official or in the event the loss is occasioned as a result of the robbery of the bank.

In my opinion, the words "insolvency or failure" are used in their broadest sense and indicate an intention on the part of the Legislature to cover the loss of funds whatever may be the cause. It has been held that a bank is insolvent when it is unable to pay its depositors and other creditors in the ordinary course of business, the usual test being the relation of the assets to the liabilities. See 9 C. J. S. 943, Section 486. If the monies deposited by you were lost because of the robbery of the bank or a defalcation on the part of a bank official, the bank would still be responsible for any shortage caused thereby, and if, because of such robbery or defalcation, the

bank was unable to meet its obligations, it would then be "insolvent" under the definition hereinabove set forth. See opinion of the Attorney General to Chief Examiner, Department of Examiner of Accounts, Capitol, under date of October 17, 1930, Office Edition of Opinions of the Attorney General, Book I, page 27.

You further inquire whether it is necessary for the County Board of Revenue to require a bond of the Columbiana Savings Bank before you will be protected.

In this regard I call your attention to an opinion rendered under date of March 9, 1933, to Mrs. Frank C. Turner, Judge of Probate, Washington County, Chatom, Alabama, Biennial Report of Attorney General, 1936-38, p. 566, wherein Section 2 of Act No. 60, supra, which requires that the court shall from time to time by resolution make such requirements as may be deemed necessary for the safety of such funds so deposited, was considered. This office in treating the question stated:

"Therefore, the question of what security will be required by the county governing body of a bank designated by it as a depository for the funds coming into the hands of the various county officials is a matter that addresses itself to the sound discretion of the county governing body. There is nothing before me to indicate that the county governing body of your county has abused its discretion in the premises and its action in this regard is not inconsistent with the general laws of this state. Consequently, they have acted within their legal authority and power in the premises. Of course, in such a case the county governing body should always take care to make such requirements of the bank designated as depository for the funds of the county officials as will be certain to safeguard the funds which come into the hands of said officials."

The premises considered, you are, therefore, advised that where you have deposited funds in a bank designated by the County Board of Revenue under the provisions of Act No. 60, supra, you are not liable for loss of the funds occasioned by the failure or insolvency of such depository bank, even though such failure or insolvency may be caused by the defalcation of an official or by the robbery of funds from the bank or by any other cause. Cf. Opinion to Hon. J. M. Yielding, County Treasurer, Jefferson County, under date of July 14, 1933, Biennial Report of Attorney General, 1932-34, p. 295.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 8, 1940.

Hon. Chas. G. Hardwick,
Tax Collector,
Morgan County,
Decatur, Alabama.

Tax Collectors — List of errors in assessment — Court of County Commissioners — Credit allowed on error list.

Clerical errors which appear on abstract furnished by tax assessor may be allowed as credit to tax collector by Court of County Commissioners or other governing body on his list of errors in assessment.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion date May 31, 1940, follows:

The Tax Assessor in this County for the tax year 1939 and preceding years, has made assessments against taxpayers who were exempt from taxation on account of being blind, insane and deaf mutes, charging the Tax Collector with the net amount of these taxes on the abstract. The original assessments show the notation 'Exempt', blind, insane or deaf mute when the assessments were made and within the time prescribed by statute.

"As the Tax Collector could not collect these taxes or sell the property on account of same being exempt from taxation, it has been the practice of the Tax Collectors to list these assessments on the Error List and file same with the County Governing Board at the June term of Court in accordance with Section 178 of the Revenue Act of 1935.

"Has the County Governing Board the authority to allow these exemptions of blind, insane and deaf-mute assessments presented by the Tax Collector for receiving credit preparatory to making final settlement with the Comptroller's office within the time prescribed by law? If the County Governing Board does not have this authority, what method shall the Tax Collector use in getting credit for these assessments made in error by the Tax Assessor in charging on the Abstract these assessments of blind, insane and deaf-mutes, when the original assessments as above devised, show the notation 'Exempt, blind, insane or deaf-mute?'"

"Our Error list, etc., for the tax year 1939 will be presented to the County Governing Board on June 10th, and we would like your opinion before this date if possible."

I have been advised by you, subsequent to the date of the above request, that the tax assessor, in making up his abstract, made a notation opposite the names of the taxpayers in question that such taxpayers were blind, insane or deaf mutes, and did not note on his abstract that these taxpayers, when the original assessments were made, had claimed and been allowed exemptions on account of either being blind, insane or deaf mutes. I am also advised that the value of the property of these taxpayers did not exceed the amount of the exemptions allowable. With the above information before me, I will now proceed to answer your inquiry.

My answer to your inquiry is in the affirmative.

Section 178 and Section 179 of the Revenue Act of 1935 read respectively as follows:

"Section 178. The tax collector shall in each year report on oath to the State Tax Commission at Montgomery, and to the court of county commissioners, or other court of like jurisdiction, at the June term thereof, a list on a form prescribed by the State Tax Commission, of the persons from whom the taxes assessed against them cannot be collected, with the amount of taxes, State and county assessed against each, which shall be termed 'list of insolvents,' and a list of such persons as have been overassessed or wrongfully assessed, with the taxes, State and county assessed against each; which shall be termed 'list of errors in assessments,' and any taxes which may be in litigation, in order that the same may be passed upon and determined by the court. The Tax Collector shall cause the said 'list of insolvents' to be published twice during the month of July following the submission thereof to the June term of the Court of County Commissioners or other Court of like jurisdiction. Said publication shall be made in a daily newspaper printed and published in said County; if no such paper is published therein, then in a weekly newspaper published in said County; if there be neither a daily or weekly newspaper of any sort published in said County, then he shall post said 'list of insolvents' in the Court House and in three other conspicuous places in said County and keep said posting available for the public during the entire month of July. A failure to publish said list as here required shall constitute a misdemeanor."

"Section 179. At the same term, such court shall make a careful and rigid examination of such lists, and of the facts pertaining thereto, in consultation with the tax assessors, and shall ascertain and determine what taxes contained in the lists of insolvents the tax collector could not, by the use of due diligence, have collected, and what taxes contained in the list of errors in assessments should not have been collected by him by reason of such errors, and shall correct such list accordingly, and shall credit the collector with the county taxes contained in such list as corrected, and shall ascertain what taxes are in litigation, and credit the collector with the county taxes so in litigation. The credits allowed the tax collector under this section shall be approved by the State Tax Commission."

This office has heretofore ruled that where clerical errors appear on the tax assessor's abstract, the tax collector may list such clerical errors on his list of errors in assessment as provided by Section 178, supra. See Quarterly Report, Attorney General, Volume IV, pages 95 and 132.

It affirmatively appears from the above request that the taxpayers in question had claimed and been allowed exemptions from taxation on account of either being blind, insane or deaf mutes, and that the original assessment sheets show these exemptions. It appears that the tax assessor, in making up his abstract, either failed to note that the property of these persons was exempt, or overlooked the fact that exemptions had been granted. This, in my opinion, would come under "a clerical error" as defined in the above referred to opinion.

You are, therefore, advised that in my opinion the county governing body of your county may allow you credit for those items appearing upon the abstract of the tax assessor under the provisions of Section 179, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 10, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Probate Judges — Recording fee — Official bonds—

1. Probate Judge entitled to fee for recording official bonds.
2. Recording fee on the bonds of the county superintendent of education and the county custodian of school funds not payable from school funds.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of April 4, 1940, in which you request my opinion as follows:

"Please give me your answer to the following question:

"Can the County Superintendent of Education pay the Probate Judge for recording the bonds of the County Superintendent of Education and Custodian of School funds?"

It appears to me that your request presents two questions: (1) Whether or not the Probate Judge is authorized to charge for the recording of the bonds in question; and (2) if so, should the recording fee be paid by the individual or from the public school funds.

In answer to the first question, it is my opinion that the Probate Judge is authorized to charge for recording the official bond of the county superintendent of education and the county custodian of school funds. Section 7285 of the 1923 Code of Alabama.

In regard to the second question, it is my opinion that the recording fee should not be paid from the public school funds. The general rule of construction is that an administrative board or other agency which is the creature of legislation has only the powers conferred by its creator and that every such board charged with the duty of devoting public funds to ends prescribed by law must point to a "thus saith the law" for every disbursement (*Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235).

Act No. 191, H. 364, approved April 20, 1933 (General Acts, 1933, page 203) generally referred to as the Bains Act, provides that the premium of bonds dealt with therein, provided the bond is over \$1,000, should be paid from the public funds. The Bains Act, *supra*, further provides that these bonds with exceptions not here material should be filed and recorded in the probate judge's office. However, the act is silent as to who should pay the filing and recording fee. I find no other provision of law authorizing the payment of this fee from the public school funds. Therefore, the premises considered, it is my opinion that the filing and recording fees on the bonds

of the county superintendent of education and the county custodian of school funds are not payable from the public school funds.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 10, 1940.

Hon. J. E. McAdory,
Deputy Tax Assessor,
Jefferson County,
Bessemer, Alabama.

Taxation — Lot Books—

Placing unit numbers opposite descriptions of property will not be a substantial compliance with Section 59 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated June 3, 1940, follows:

"I request an official opinion as to whether or not we are required by law to post to our plats and block books names of owners of real estate, with assessed values thereof, as defined in Section 59 of the 1935 Revenue Code. Under the unit system, we have set up a control card with a unit number governing each description of real estate and listing name of owner, as assessed, together with values of property for assessment. Will it be lawful to post only the unit numbers to the descriptions set out on plats and block books?

"As I understand the unit system which applies to Jefferson County, the old law was repealed so as to set up a complete new system according to the present method of assessment.

"I am sending you a property assessment record, or a control card, which is kept at all times in the Assessor's office as a record, a ledger card which is kept at all times in the Collector's office, and a sheet from the block book showing the proposed change in the method of posting unit numbers instead of names. The unit numbers are to be repeated on the block book yearly only when the number is 'split' to show a division or combination of property. The unit numbers serve merely as keys to the control cards."

In my opinion, your inquiry should be answered in the negative.

Section 59 of the 1935 Revenue Act provides as follows:

"Section 59. It is the duty of the Tax Assessor of every county in the State to procure at the expense of the County a book in the form to be prescribed by the State Tax Commission, in which he shall enter a complete map and list of all the blocks and lots which have been platted and the maps of which are recorded in the office of the Judge of Probate or can be procured within his County beginning with the lowest numbered block and lot and proceeding in numerical order to the highest, **with the name of the owner set opposite each block and lot, together with the assessed value thereof.** Each subdivision or addition to any town or city shall be shown by proper headings at the top of each page of such lot book, and by index in the front thereof. The Tax Assessor shall annually make the entries thereon, for which he may be allowed a reasonable compensation by the Court of County Commissioners or Board of Revenue." (Emphasis ours)

I have carefully examined Act No. 176, S. 177, approved April 21, 1936 (General Acts, 1936, p. 205) and amendments thereto, which provide for a uniform system of assessing and collecting taxes in all counties within a certain population classification (Jefferson). In my opinion Section 59, supra, has not been repealed by Act No. 176, and amendments thereto, but is still in full force and effect. In the case of **Dearborn v. Johnson**, 234 Ala. 84, 173 So. 864, our Supreme Court in dealing with the act under consideration here stated as follows:

"The act here in question only repeals so much of the general Revenue Code as conflicts therewith, leaving unaffected those applicable provisions not specifically treated."

The subject matter of Section 59, supra, was not treated specifically in Act No. 176, supra.

It is my opinion that the posting of unit numbers opposite the descriptions will not be a substantial compliance with Section 59, supra, as it expressly provides that the name of the owner and the assessed value should be placed opposite each description.

"The words of a statute should be given their ordinary meaning unless it appears from the context or otherwise in the statute that a different sense was intended."

Alabama - Southern Digest, Vol. 25, Statutes, Key No. 188, and Alabama cases cited thereunder.

This office in an opinion to Hon. Luther Fowler, Tax Assessor, Shelby County, Columbiana, Alabama, dated January 31, 1939 (Quarterly Report of Attorney General, Vol. XIV, p. 68), held that installation of a card index or other system was not authorized under Section 39 of the Revenue Act, which provides the manner of describing property listed for taxation.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 10, 1940.

Hon. Eugene H. Hawkins,
Probate Judge,
Jefferson County,
Birmingham, Alabama.

Taxation — Tax Sales — Redemption by Mortgagee—

Mortgagee seeking to redeem real estate covered by his mortgage from sale to State for taxes assessed against said real estate, must deposit with Probate Judge the amount of money for which the real estate was sold for taxes, including taxes assessed against mortgagor on his personal property where the real estate was the only real estate assessed against mortgagor. Acts, 1936, Extra Session, page 30.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of May 30, 1940, follows:

"A mortgagee is seeking to redeem a parcel of real estate which was sold for 1932 taxes. The mortgage was of record in this office prior to October 1, 1931. In addition to the parcel of real estate, the tax payer assessed certain personal property, the assessed value of the personal property \$3203.00 and the assessed value of the parcel of real estate being \$600.00. The mortgagee contends that he has the right to redeem the parcel of real estate without paying the personal property tax included in the amount for which the real estate was sold. The property on which the mortgage was a lien was the only parcel owned or assessed by the taxpayer.

"Please advise whether or not the mortgagee should be required to pay the entire amount for which the real estate was sold or only the amount assessed against the said real estate."

The foregoing statement fails to show whether the property in question was sold to the State, or to some other purchaser, whether the sale was made prior or subsequent to January 1, 1935, and whether or not title has passed out of the State, in case the State purchased at the tax sale.

Assuming the sale to have been made to the State, in due course as required by law, in 1933, and that title has not passed out of the State, I am of opinion that the mortgagee must pay the entire amount for which the real estate was sold in order to redeem.

I find no prior opinion of this office as to the exact question, but the matter would seem too plain to require extended discussion.

The latest legislative enactment pertinent to the question is contained in Act No. 55, H. 24, approved March 26, 1936 (Acts 1936, Extra Session, page 30), amending Section 269 of the Revenue Act of 1935. Said Act No.

55 requires the redemption to deposit with the Judge of Probate "**the amount of money for which the lands were sold**, with interest" etc., in cases where the lands were sold to the State, whether before or after approval of the act.

The legislative intent is further evinced in Section 271 of the Revenue Act of 1935 (Acts, 1935, page 370), providing for redemption of one or more of several parcels of land sold for taxes under one decree, requiring payment by the owner in such case of "all tax on personal property assessed against him."

As the lien for ad valorem taxes is superior to all other liens, including of course a prior mortgage lien, under Section 372 of the Revenue Act of 1935 (Acts, 1935, page 566), the lien would probably be lost, in cases such as this, if redemption were allowed, whether by a mortgagee or the owner, without satisfaction of the lien for personal property taxes, which is a part of the "**amount for which the lands were sold**."

Subdivision (d) of Section 1 of said Act No. 55, supra, preceded by provision as to assessment of taxes due for years subsequent to sale to the state, also reads:

"(d) The redemptioner shall deposit with the probate judge the **amount of money for which lands were sold for taxes**, plus the amount of money due for subsequent years based on the assessment value as required to be fixed in sub-section (b) of this Section, and interest, costs and fees as provided in sub-section (a) of this Section."

In my judgment, this language is too clear to call for or require construction. It is my opinion that in the absence of express statutory provision for redemption by a mortgagee, without payment of the taxes on personal property included in the amount for which the real estate was sold, such mortgagee must pay the full amount.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 11, 1940.

Hon. B. H. Baker, Clerk,
Circuit Court, Barbour County,
Clayton, Alabama.

Preliminary Hearing — Costs and Fees — Clerks—

The \$2.00 fee provided for in preliminary investigations by Act No. 225, H. 71, General Acts, Extra Session, 1936-1937, where the defendant is sentenced to hard labor or to the penitentiary can only be collected under execution against the defendant and is under no conditions payable by the State or out of the fine and forfeiture fund.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 31, 1940, in which you request my opinion as follows:

"By Bill Number 225, approved March 2, 1937, the Clerks of the County Court were made Clerks of the Probate Court sitting as Magistrates.

"The bill attempts to give the Clerks a fee of Two Dollars for this service. Since the passing of this bill it has been ruled that this item of Two Dollars can not be paid out of the Convict Fund, and it has also been ruled that it can not be paid out of the Fine and Forfeiture Fund. Now, this inquiry is Where is the Clerks to get pay for this service? Are Clerks required to perform this duty without pay?

This fee cannot be collected from the State under any conditions. Biennial Report of Attorney General, 1936-1938, page 423. Neither can this fee be collected from the county Fine and Forfeiture Fund. Quarterly Report of Attorney General, Vol. VIII, page 240.

If the defendant is convicted and presently pays or confesses judgment for costs and fine, the \$2.00 clerk fee provided for by the Act No. 225, H. 71, approved March 2, 1937, General Acts, Extra Session, 1936-1937, page 268, on the preliminary hearing would become a part of the costs. If the defendant is convicted and is sentenced to hard labor or to the penitentiary, then this \$2.00 fee due the clerk could not be paid by the State for the reason given in the opinion of the Attorney General cited above. The only way this fee can be collected when the defendant is sentenced to hard labor or to the penitentiary is by execution against the defendant for the costs.

It is my opinion that the Circuit Clerk, as ex officio Clerk of the County Court, is required to perform the services required by the act in question, regardless of the fact that he may or may not collect his fee.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 11, 1940.

Hon. J. Paul Meeks,
Associate Member,
Board of Equalization,
Jefferson County,
108 Court House,
Birmingham, Alabama.

Board of Equalization—

Powers, duties and functions of Boards of Equalization in counties having a population of 200,000 or more discussed generally.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated April 10, 1940, as follows:

"Will you kindly give your opinion on the following questions relative to the time limitations on the Board of Equalization of Jefferson County:

"1. House Bill 871 of the 1939 Legislature provides that Board of Equalization '..... shall place a value on said property so assessed for the present tax year, and shall complete said work of fixing the assessed value of said property on or before the second Monday in April.'

"Question: Does this Act limit the time to the second Monday in April in which notices of changes in assess-values, either increases or decreases, may be mailed to taxpayers, covering the current year's assessments?

"2. This Act also provides that '..... all protests must be filed prior to May 15th and must be heard and determined on or before July 1st., subsequent to the filing of the same.'

"Question: Should protests be received and accepted on May 15th?

"Question: In the event any duly filed protests have not been heard and determined on or before July 1st, may an extension of time beyond that date be allowed by the Commissioner of Revenue to complete the hearings and determinings of such protests?"

Before proceeding to an answer to the several questions propounded in the above request, allow me to briefly discuss the effect of Act No. 532, H. 871, approved September 22, 1939, (General Acts, 1939, page 830) on the Board of Equalization of Jefferson County.

Under the provisions of Act No. 532, supra, the functions of the Board of Equalization in counties having a population of 200,000 or more (See Act No. 50, H. 89, approved February 2, 1937, General Acts, 1936-37, p. 34) differ from the functions of the Board of Equalization in the several other counties of the State in the following aspects:

1. In counties having a population of 200,000 or more, the Boards of Equalization are given until the second Monday in April to complete the work of fixing the assessment value of the real property in such counties, whereas, under the provisions of Act No. 143, S. 14, approved March 15, 1939 (General Acts, 1939, page 178) — The Board of Equalization Act — the work of fixing the assessment value of real property in the several other counties of the State must be completed by the Board of Equalization by the first Monday in April.

2. In counties having a population of 200,000 or more, objections to the assessment value of property fixed by the Board of Equalization must be filed by the taxpayer prior to May 15, whereas in the several other counties of the State, such objections must be filed on or before the last Monday in April.

3. In counties having a population of 200,000 or more, objections filed to the assessed value of property must be heard by the Board of Equalization on or before July 1, whereas, in the several other counties of the State such objections must be heard on or before the second Monday in July.

It is my opinion that, other than as pointed out above, the functions and duties of the Boards of Equalization in counties having a population of 200,000 or more are the same as those of the Boards of Equalization of the several other counties of the State, and are governed by the provisions of Act 143, supra. (Quarterly Report of Attorney General, Vol. XV, page 136.)

I will now proceed to answer categorically the several questions propounded in your request.

My answer to your first question is in the negative.

Under the provisions of Act No. 532, supra, the Board of Equalization of Jefferson County is given until the second Monday in April to complete the work of fixing the assessed value of the real property in that county. It is clear that the work of the Board in this regard is not complete until that date, and I do not believe, that, by any stretch of the imagination, the Board could be limited to the giving of notices of changes in assessed values to taxpayers on the same date its work is completed. It will be noted that a taxpayer is given until May 15 to file objections to the assessment value fixed by the Board. It is my opinion that it was the legislative intent that the interim between the second Monday in April, the date upon which the Board completes its work of fixing assessment values, and May 15, the dead-line for filing objections, be used by the Board in giving notices to taxpayers of changes in assessments, and the filing of objections by the taxpayers to such changes. (See Section XVI of Act No. 143, supra, and that part Act No. 532, supra, in regard to notice by registered mail in case the Board of Equalization raises the assessment.)

My answer to the first part of your second question is in the negative. It is a well known rule of statutory construction that where the language used in the statute is clear and unambiguous, there is no room for construction to arrive at the legislative intent. *City of Birmingham v. Southern Express Co.*, 164 Ala. 529, 51 So. 159. It appears from the clear and unambiguous language in Act No. 532, supra, that all objections to the assessed value fixed by the Board of Equalization must be filed prior to May 15. This, in my opinion, negates the idea that such objections may be filed on May 15.

My answer to the second part of your second question is in the affirmative.

As pointed out above, it is my opinion that the Boards of Equalization in counties having a population of 200,000 or more are governed by Act No. 143, supra — the Board of Equalization Act — in all respects other than

as provided in Act No. 532, supra. The difference in the functions and duties of the Boards have already been noted hereinabove. I find no provision in Act No. 532, supra, which leads me to believe that the Board of Equalization of Jefferson County is not governed by that part of Section XVII of Act No. 143, supra, wherein it is provided that the State Department of Revenue may otherwise order the disposition of objections to assessments filed with the Board than as provided in said Act. It is, therefore, my opinion that if the Board of Equalization of Jefferson County does not finish the work of hearing all duly filed protests on or before July 1, then, in that event, the State Department of Revenue may extend such time for hearing the protests, as provided by Section XVII of Act No. 143, supra.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 11, 1940.

Hon. Hill Ferguson, Chairman,
Board of Equalization,
Jefferson County,
Birmingham, Alabama.

Taxation — Assessments—

Where a taxpayer duly protests assessment and appeals from the decision of the board of equalization making assessment final, and the appeal is not heard until the expiration of the next succeeding tax year, the judgment of the court fixing the value for the first year has no bearing whatever upon the determination made by the board of equalization for the succeeding year; and in the absence of protest filed within the time provided by law said board of equalization is without authority or jurisdiction to reopen the assessment for said succeeding year for the purpose of making the values the same as those determined by the court for the preceding year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 29, 1940, in which you request my opinion as follows:

"The provisions for protesting valuations fixed by the Board of Equalization of Jefferson County are found in Section five (5) of an Act approved April 21, 1936 creating the Unit System of assessment in counties having a population of 110,000 or more. Section five (5) was amended by House Bill 871, approved September 22, 1939. Section five (5) as amended provides that all protests must be filed prior to May 15th of each year.

"There are cases pending in the Circuit Court of Jefferson County which were appeals from valuations fixed by this board for the tax year 1939. Protests were not filed with this board prior to May 15, 1940, for the tax year 1940, with reference to the valuations fixed by the Tax Assessor of Jefferson County on certain of these parcels of property involved in certain of the appeals pending in the Circuit Court involving the valuations for the year 1939.

"Will you please give us your opinion as to whether these property owners can take advantage of the valuations finally fixed in the appeals for 1939, for the current tax year, where no protests were made prior to May 15, 1940?"

I am of the opinion that your inquiry should be answered in the negative.

In an opinion of this office rendered to the State Comptroller on February 1, 1939 (Quarterly Report of Attorney General, Vol. XIV, page 92), it was held that where a taxpayer duly protests assessment and appeals from the decision of the board of equalization making assessment final, and the appeal is not heard until the expiration of the next succeeding tax year, the judgment of the court fixing the value for the first year has no bearing whatever upon the determination made by the board of equalization for the succeeding year; and in the absence of protest filed within the time provided by law said board of equalization is without authority or jurisdiction to reopen the assessment for said succeeding year for the purpose of making the values the same as those determined by the court for the preceding year. See also Quarterly Report of Attorney General, Vol. XIII, page 111.

The above cited opinions are based on the theory that each annual assessment of property for taxation is a separate entity distinct from the assessment for the next and subsequent years, and that the proper valuation for one year may not be the proper valuation for the next year, and that, unless objection is made to an assessment within the time provided by law, any proceedings by a board of review thereafter are coram non judice and void. *Marre v. State*, 200 Ala. 278, 76 So. 44; *Daffin v. Scotch Lumber Co.*, 226 Ala. 33, 145, So. 452.

Although the above authorities deal with our old boards of review, the principle of the decisions are likewise applicable to our newly constituted boards of equalization. The fact that Jefferson County may operate under laws slightly different from our general law has no bearing on the situation as said special laws do not affect the assessment of property in the respect under consideration. Cf. *Dearborn v. Johnson, et al.*, 234 Ala. 84, 173 So. 864.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 11, 1940.

Hon. William A. Conrad, Clerk,
Circuit Court, Mobile County,
Mobile, Alabama.

Criminal Law — Final Record—

Where the minutes of any court having a grand jury show the organization of the court and the grand jury, this is sufficient and need not be repeated in making the record of each individual case as these minute entires are referable to each case.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of April 25, 1940, in which you request my opinion as follows:

"I respectfully request your opinion on the following question:

"Where a Grand Jury returns we will say two hundred and twenty-five indictments and the organization of the Grand Jury is set out in full on the minutes of the Court is it the mandatory duty of the Clerk in making up the final record in said two hundred and twenty-five cases to record said organization as part of the final record in each of said cases? In other words, is it necessary to record said organization of the Grand Jury two hundred and twenty-five different times?"

My answer to your request is in the negative.

I call your attention to Section 10126, Code of Alabama, 1928, Michie, which is as follows:

"Section 10126. Double records dispensed with. — The orders, judgments, and decrees entered upon the minutes of the court are parts of the record of the causes to which they pertain, and need not be copied into the final record. If so copied, no fee shall be charged therefor."

This section applies to both civil and criminal cases. **Carmichael v. Mathews**, 134 Ala. 210, 32 So. 681.

In this connection, I call your attention to the case of **McGee v. State**, 24 Ala. App. 124, 131 So. 248.

Judge Bricken, in delivering the opinion of the court, said:

"The caption of an indictment contemplated under section 4526 of the Code of 1923, is that entry of record showing when and where the court is held, who presided as judge, the venire, and who were summoned and sworn as grand jurors; **all this to be shown by the minutes of the court, and this caption is applicable to or is a part of every in-**

dictment preferred at such term of the court, and need not be again repeated in any part of the indictment." (Emphasis supplied)

Therefore, it is my opinion there where the minutes of the court show the organization of the court and grand jury, this is sufficient and need not be repeated in making the final record of each criminal case based on an indictment returned at that session of the court. Each indictment will show at what term of the court it was returned and the minutes of the court must show the organization of the same and of the grand jury. In this event each indictment is referable to the minutes of the court. *McGee v. State*, supra; *Overtone v. State*, 60 Ala. 73; *Curtis v. State*, 9 Ala. App. 36, 63 So. 745.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 11, 1940.

Hon. John C. Curry, Commissioner,
Department of Revenue,
Capitol.

Sales Tax — Costs—

Fee of probate judge for filing claim against the estate of a deceased person for sales tax held payable from the funds collected under the provisions of Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16).

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 27, 1940, in which you request my opinion as follows:

"One K. C. Cornelius, resident of Jefferson County, died during the year 1939, owing the State of Alabama for sales tax for the period April through September 1939. Within six months after the granting of letters of administration by the Probate Court of Jefferson County, the State Department of Revenue, acting for the State of Alabama, filed Proof of Claim with said Probate Court for said tax claim. The Probate Judge has submitted to the State Department of Revenue a bill for the filing of this claim with him.

"Will you kindly give us your opinion, first, as to whether this claim can be paid by the State Department of Revenue? Second, against which fund should this amount be charged?"

In reply to your first question, I wish to advise that it is my opinion that the claim of the judge of probate here considered is authorized by law. Section 7285, Code of Alabama, 1923, provides, in part, as follows:

"Section 7285. Judges of Probate are entitled to the following fees for the following services — * * * * Filing each claim and giving receipt therefor — 15c. * * * *"

I also call your attention to Section XXXV of Act No. 18, H. 82, approved February 8, 1939 (General Acts, 1939, page 16), which provides, in part, as follows:

"Any and all expenses, including salaries, necessary to provide for the administration and enforcement of this act shall be paid out of the proceeds of the collection therefrom before any distribution or disbursement."

In my judgment, the fee for filing the claim herein considered constitutes an expense of administration or collection of the tax considered and is legally chargeable to the Department of Revenue to be paid from the moneys collected under the provisions of the above considered Sales Tax Act of 1939. In my judgment, full authority is vested in the State Department of Revenue to pay claims of this nature which are claims arising in connection with the administration and enforcement of the Sales Tax Act of 1939.

I wish to refer you to an opinion of the Attorney General addressed to Mr. W. Lee Stanley, Clerk of the Circuit Court, Colbert County, Tusculumbia, Alabama, under date of January 8, 1940, a copy of which is enclosed for your convenience.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 11, 1940.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Counties — County Governing Body—

County governing body authorized to pay cost of labor in relocating power lines of the Central Alabama Electric Membership Corporation which were required to be moved off the said corporation's private right of way before county roads could be widened.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion dated April 15, 1940 follows:

"The Central Alabama Electric Membership Corporation is a Federal Electrification Project, and Autauga County is one of the counties it operates in.

"Recently one of the County roads had to be changed or widened which would require part of the line to be moved. The above named corporation moved the line and have charged the County for moving the line.

"I want your opinion on the following question.

"Is the County allowed to pay for the moving of the line out of the Gasoline or General fund?

"A copy of the invoice is enclosed for your inspection."

You further advise as follows:

"With further reference to our request for an official opinion on whether or not the County Board of Revenue can legally pay a claim, presented by the Central Alabama Electric Membership Corporation for services rendered by them.

"Mr. J. N. Price, Commissioner of District Number Four, where the work took place, made the following agreement:

"If the Corporation mentioned above would furnish the materials for the moving of the line, then the County would pay the expense of the labor for moving same. The County was to pay the labor for moving the line, and the corporation was to pay for the materials, necessary wire, etc."

It is my opinion that the County Board of Revenue of Autauga County may pay the claim filed by the Central Alabama Electric Membership Corporation out of the gasoline fund of said county, or may pay the same out of the monies taken from the general fund of said county, in the manner and subject to the conditions hereinafter set forth.

In arriving at the above conclusion, the first question considered was whether or not the Board of Revenue of Autauga County is authorized and empowered to pay the claim filed by the Central Alabama Electric Membership Corporation out of any funds of the said County. In this connection, attention is first called to Sections 1397(110) and 6754 of Michie's Code of Alabama, 1928, which are respectively as follows:

"1397(110) The courts of county commissioners, boards of revenues, or other like governing bodies of the several counties of this State have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judi-

cial, and executive powers, except as limited in this article, Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. **They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof;** but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

"6754. The court possesses original and unlimited jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways, ferries, and stock law districts within the county, unless where otherwise provided by law, to be exercised in conformity with the provisions of this Code."

In my opinion, in view of the powers, authority, and jurisdiction conferred upon the governing bodies of the several counties of the State by Sections 1397(110) and 6754, supra, in relation to county roads, the Board of Revenue of Autauga County has a right to pay the claim filed by the Central Alabama Electric Membership Corporation. The claim, according to the facts presented for the purpose of this opinion, shows that it was for the cost of labor in moving part of the line owned by the said corporation off of its own private right of way, which was necessary before the county road could be widened. It is further shown that one member of the County Board orally agreed that if the said corporation would pay for the material used in moving the said lines, that the county would pay the necessary expense of the labor. Certainly the Board of Revenue of Autauga County, acting in its official capacity, could have entered into a contract with the said corporation similar to the one made by its individual member and would have been authorized to pay the cost of the labor necessary in relocating the lines. Therefore, the only question remaining to be answered in this connection is whether or not the said Board of Revenue can not ratify the said agreement or contract orally made by its individual member with the said Central Alabama Electric Membership Corporation. As to this question, this office has uniformly held that an individual member of a county governing body is without authority to bind a county, but his action may later be ratified by the governing body of the county.

Opinion to Hon. C. E. Carmichael, Judge of Probate, Colbert County, Tuscumbia, Alabama, dated November 23, 1939, Quarterly Report, Attorney General Vol. XVII, page 299; Opinion to Probate Judge of Jackson County, dated August 22, 1929, Biennial Report, Attorney General 1928-30, page 591; Opinion to J. B. VanValkenburg, Chairman Madison County Board of Commissioners, Huntsville, Alabama, Quarterly Report Vol. IX, page 33.

The last question to be considered is whether the said claim can be paid from either the gasoline fund or the general fund of the county. In this connection, I call your attention to Schedules 156.9, 156.10, 156.11 of Section 348 of Act No. 194 (Gen. Acts, 1935, pp. 511-14), which control the use of gasoline tax by counties and provide that such funds "shall be expended

exclusively in the construction, maintenance and repair of roads and bridges in such county." (Section 156.11 was amended by Act No. 510, H. 782, approved September 19, 1939, General Acts 1939, p. 792, but is not here material.) Therefore, since the relocating of the lines owned by the Central Alabama Electric Membership Corporation was necessary for constructing and repairing the county road, it is my opinion that the Board of Revenue of Autauga County has a right to pay the said claim out of the county gasoline fund.

With reference to paying said claim out of the general fund of the county, attention is called to Section 1397(115) of Michie's Code of 1928, which in my opinion answers this inquiry. Section 1397(115), supra, is as follows:

"1397(115). The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

Of course, there are certain restrictions thrown around such a transfer. In the cast of **Rhodes vs. Marengo County Bank**, 205 Ala. 667, 88 So. 850, our Supreme Court laid down the following rule:

"While Act Sept. 22, 1915 (Laws 1915, p. 573), authorizes the transfer of any surplus of a portion of the general fund to the road fund cannot be justified under that act, where the county was much indebted, and there were warrants having priority unpaid."

See also opinion of this office to Hon. Frank O. Deese, Judge of Probate, Dale County, Ozark, Alabama, dated September 21, 1939, Quarterly Report, Attorney General, Vol. XVI, page 262.

Premises considered, it is my opinion that the claim of the Central Alabama Electric Membership Corporation may be paid by the Board of Revenue of Autauga County, Alabama out of the gasoline fund of said county or may be paid out of the monies taken from the general fund of said county, in the manner and subject to the conditions hereinabove set out.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 12, 1940.

Hon. Robert M. Hill, Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Probation — Suspension of execution of sentence—

1. Courts from whose judgment appeal lies directly to Court of Appeals or Supreme Court have authority and jurisdiction to entertain and act upon applications for suspension of sentence and for probation of persons convicted therein at any time before the beginning of the execution of the sentence imposed upon such applicants.

2. Courts from whose judgment appeal does not lie directly to the Court of Appeals or Supreme Court have no authority or jurisdiction to entertain applications for suspension of sentence and for probation (for the purpose of certifying the same to a court which has authority and jurisdiction to suspend execution of sentence or to grant the benefits of probation) subsequent to the expiration of one day after the imposition of sentence in such courts upon the applicants.

3. Circuit Court, after affirmance or dismissal, has authority and jurisdiction for suspension of sentence and for probation in case in which the defendant appeals to the appellate courts of Alabama and the appeal is affirmed or dismissed, if such application is made before the beginning of the execution of the sentence imposed under the judgment appealed from.

Opinion by Assistant Attorney General Howe.

Dear Sir:

I have your letter of May 18, 1940, in which you request my opinion as follows:

“This Department requests an opinion from you construing the recent Act of the Legislature number 278; S. 198-Simpson passed at the regular session, 1939, known as the Probation Act. The specific matters on which we wish an opinion are:

“1. When, or how many days after the date of conviction, does the trial court lose its jurisdiction to consider an application for probation?

“2. If a convicted defendant at any time within thirty days after the date of his conviction makes application for probation, can his application be acted upon by the Circuit Judge?

“3. If a defendant appeals to the court of appeals from a conviction in the Circuit Court, can such defendant, after the lapse of thirty days from the date of his conviction, withdraw or dismiss his appeal and make application to the Circuit Judge to be placed on probation; if so, would the Circuit Judge have the jurisdiction to act upon such application?

"4. If, upon conviction, a defendant appeals to the court of appeals, and his conviction is affirmed, does the Circuit Judge have jurisdiction, after such affirmance, to consider an application and, if so, within what time after such affirmance would application have to be made to the Circuit Judge?

Your first inquiry cannot be answered categorically for the reason that the so-called "Probation Act," to which your request refers, classifies trial courts exercising criminal jurisdiction, viz., (1) Circuit Courts and courts of record from whose judgment's appeal lies directly to the Court of Appeals or Supreme Court and (2) justice of the peace courts, inferior courts established in lieu of justice of the peace courts, county courts, recorder's courts, courts of common pleas, law and equity courts or other courts of inferior jurisdiction from whose judgments appeal does not lie directly to the Court of Appeals or the Supreme Court and provides different methods for suspension of sentence and granting probation in each class.

In my opinion, as to those courts in the first classification, supra, the authority, jurisdiction and power to entertain and to consider and act upon an application for suspension of the execution of sentence and for probation is not foreclosed at any time before the execution of the sentence begins, that is to say, until the defendant has begun the service of the sentence imposed upon him.

As to those courts in the second classification, supra, it is my opinion that the power to entertain an application for suspension of execution of sentence and for probation (which application must be certified to a court of the county in which the first classification, supra, for consideration and action) is foreclosed at the expiration of one day after the imposition of sentence in such a trial court.

Act No. 278, S. 198, approved August 24, 1939 (General Acts, Regular Session, 1939, page 434), the so-called "Probation Act," as relates to authority, jurisdiction and power of courts in the first classification, supra, provides in Section 1 thereof, in pertinent part, as follows:

"Circuit Courts and courts of record from whose judgments appeal lies directly to the Court of Appeals or the Supreme Court, subject to the provisions and conditions hereinafter provided, may suspend execution of sentence and place on probation any person convicted of crime in any court exercising criminal jurisdiction. * * * * Except in the case hereinabove provided, Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court, after a plea of guilty, or after the returning of a verdict of guilty by the jury, or the rendition of a judgment of guilty by the court may suspend execution of sentence and place the defendant on probation, or may impose a fine within the limits fixed by law and also place the defendant on probation."

The quoted section, and, indeed, much of the entire Act, is based upon Chapter 30, Kentucky Acts of 1936, page 74. I do not find a case in which the Kentucky Court has construed the statute. It will be noted that the statute provides no time limit within which the court must exercise the authority, jurisdiction and power conferred upon it.

The several acts providing for the authority, jurisdiction and power of trial courts to suspend the execution of sentence and to place on probation persons convicted of crime therein enacted by the Congress of the United States and by the legislative bodies of the several states are substantially similar. The constitutional provisions upon which the several legislative enactments are bottomed vary in detail rather than in their cardinal features.

The Supreme Court of the United States in *United States v. Murray*, 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309, had under consideration the question of the time, after conviction, within which district courts of the United States may exercise the authority, jurisdiction and power conferred upon them by the federal act. Mr. Chief Justice Taft, speaking for the Court, said:

"The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real locus poenitentiae between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. Probation was not sought to shorten the term. Probation is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence. **The beginning of the service of the sentence is a criminal case ends the power of the court even in the same term to change it.** Ex parte Lange, 18 Wall. 163, 21 L. ed. 872. Such a limit for probation is a natural one to achieve its end.

"The words of the first section important upon this issue are, 'shall have power, after conviction or after a plea of guilty or nolo contendere, . . . to suspend the imposition or execution of sentence and to place the defendant upon probation.' The words mean to suspend the imposition of sentence or to suspend the execution of sentence, and that the placing of defendant upon probation is to follow the suspension of the imposition or the suspension of the execution of sentence, without an interval of any part of the execution. That is a reasonable construction and serves the well understood purpose of the statute. The suspension of execution was the point in time to which the provision for probation was directed. We do not say that the language is not broad enough to permit a possibly wider construction, but we think this not in accord with the intention of Congress." (Emphasis supplied)

In *People ex rel. Woodin, District Attorney v. Ottaway, County Judge*, 247 N. Y. 493, 161 N. E. 157, the highest court of New York considered a case wherein certain defendants were sentenced to imprisonment in the state prison for a term of not less than one year nor more than two years. The court then adjourned, sine die. Thereafter the defendants appealed to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed. **After affirmance**, the trial court granted motions to suspend the execution of judgment under the New York statute providing therefor. The district attorney applied for mandamus to be directed to the judge of the trial court to compel him to complete the commitment

papers and to vacate the order granting the suspension of execution of the sentences. In a per curiam opinion in which Chief Judge Cardozo and Judges Pound, Lehman and O'Brien concurred and from which Judges Crane, Kellogg and Andrews dissented, the court said:

"Jurisdiction to stay the execution did not expire with the term at which the prisoners were tried. Like the power to revoke the suspension, it was not confined to one term nor even to one judge, but was vested in the court. * * * (Citing cases) * * *. The one limitation upon the time of its exercise is stated in the statute (Penal Law, Section 2188):

"The imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." Cf. *United States v. Murray*, and *Cook v. United States*, 48 S. Ct. 146, 72 L. Ed. 309, Jan. 3, 1928.

"The order suspending the execution of this judgment was made by the County Court before imprisonment had commenced. It was made by the same judge who had presided at the trial, so that there is no occasion to consider the questions of judicial comity or propriety that might conceivably arise if it had been made by another judge while the trial judge was present or competent to act. If the stay was indiscreet, the indiscretion may not be remedied by resort to a mandamus.

"Jurisdiction was not lost through the appeal to the Appellate Division and the affirmance by that court before the order for a stay was made. Section 546 of the Criminal Code does not touch the situation. All that it does is to confer power on appellate courts to make such directions as may be necessary in view of changed conditions to carry a judgment into effect; as, e. g., where the date fixed for the execution of a death sentence has expired pending an appeal. There was no thought to invest them with jurisdiction to determine whether sentence should be suspended or a defendant placed upon probation. This conclusion becomes the more obvious when we consider a few dates. Section 546 goes back in its present form to 1882. The power to suspend sentence did not have recognition in any statute till 1893. L. 1893, c. 279, amending Penal Code, Section 12; *People ex rel. Forsyth v. Court of Sessions of Monroe County*, 141 N. Y. 288, 294, 36 N. E. 386, 23 L. R. A. 856. Not till 1918 was there a statute giving power to impose a sentence in the first instance, and thereafter stay the judgment. L. 1918, c. 457. Cf. L. 1913, c. 125, amending Code Crim. Proc. Section 517, and superseding *People v. Flaherty*, 126 App. Div. 65, 110 N. Y. S. 699. Obviously section 546 was framed *alio intuitu*. The problem might wear another aspect if the discretion to suspend or stay were subject to review upon appeal. There is no contention that it is.

"A judgment of affirmance either by this court or by the Appellate Division is not an expression of opinion as to the propriety of staying or suspending the execution of the sentence. There is no jurisdiction in either court to express such an opinion with any authoritative force. The Appellate Division can indeed reduce the sentence, but never below the minimum penalty provided by law. Code Crim. Proc. Section 543. **The power to stay execution, like the power to revoke the stay, or to place a defendant on probation, is confided to the court of original jurisdiction,** which may be controlled in the exercise of its discretion by information

dehors the record. **It is not shorn of the power by an intermediate appeal.**" (Emphasis supplied)

In the dissenting opinion, Judge Crane said:

"After a sentence of imprisonment, it is the duty of the sheriff forthwith to deliver the defendant to the proper prison authorities for incarceration. Before he does this, the judge may suspend the judgment. But if the sheriff in executing the judgment is stayed by a certificate of reasonable doubt, the stay or the certificate operating as a stay takes the place of the imprisonment. In other words, this proviso of section 2188 runs until the imprisonment in the ordinary course of procedure or until something else is substituted for the imprisonment. The certificate of reasonable doubt is such substitution. These defendants were out on a certificate of reasonable doubt pending the appeal to the Appellate Division. That court passed upon the judgement of conviction and affirmed it. I do not think it was the intention of the Legislature to give to the trial court thereafter the power to suspend the judgment which the Appellate Division affirmed. The fact that the Appellate Division has the power to modify the judgment imposed upon the defendants is a strong indication that the power of suspension given in section 2188 did not survive the action of the Appellate Division. **In fact, the power ceased long before action by the Appellate Division. It ceased with the imprisonment of the defendants.** If there had been no certificate of reasonable doubt, they would have been imprisoned immediately. The certificate of reasonable doubt, while keeping them out of prison, did not in my judgment keep alive the power to suspend the execution of the judgment.

"This interpretation of section 2188 to my mind is quite reasonable. If the trial courts are to have the power of suspension after the appellate courts have passed upon the record, the matter should be called to the attention of the Legislature so that their intention in this matter may be more clearly expressed. I for one do not believe that the Legislature ever intended this power to exist beyond the day when imprisonment should have taken place in the ordinary course of procedure." (Emphasis supplied)

In **Lloyd v. Superior Court of California in and for Los Angeles County et al.**, 208 Calif. 622, 283 P. 931, the Supreme Court of California considered a case wherein a defendant was convicted of manslaughter and sentenced to a term in the state prison, from which judgment of conviction he appealed to the District Court of Appeals of California, where the judgment was affirmed. Pending his appeal, he was confined to the county jail. **After affirmance**, he applied to the trial court for an order granting him probation, which application was denied upon the sole ground that the trial court had no authority to entertain said application or to grant probation thereon after appeal by said defendant from its judgment and sentence, and **after affirmance** of the judgment for mandamus to require the trial court to entertain the petition for probation.

In disposing of the question, the Supreme Court of California said:

"In the case of *People ex rel. Woodin v. Ottaway*, 247 N. Y. 493, 161 N. E. 157, decided in 1925, the precise question as to the correlation of the several earlier enacted sections of the New York Criminal Code, and which are identical in form with Sections 1191, 1263, and 1265 of our own Penal Code, as these sections originally read, upon the provisions of the

later enacted probation law of New York, arose and was considered, and it was therein held that no such correlation existed as would prevent a defendant from making his application for probation at any time before the execution of the judgment and sentence, and this without regard to whether he had or had not prosecuted a vain appeal.

"In the case of *State ex rel. Bottomly v. District Court, etc.*, for Blaine County, 73 Mont. 541, 237 P. 525, also decided in 1925, the Supreme Court of Montana, in construing certain sections of the Penal Code of that State, which in their adoption had been based upon like provisions of the Penal Code of California, including section 1203 thereof, held, in a case in its main aspects identical with the instant proceeding, that the trial court had jurisdiction under the terms of the probation law of that state to suspend the execution of a jail sentence and place the accused upon probation after the dismissal of his appeal. In so deciding said court differentiated between the case before it and the *Beggs Case*, but in so doing referred to the 'vigorous dissenting opinion' in the latter case, and then proceeded to hold that since, in the probation statute of Montana, there was no express limitation upon the power of the trial court to entertain an application for probation at any time prior to the execution of the sentence it must be held to possess such power in conformity with the liberal interpretation which should be adopted with reference to remedial legislation of this character.

"In the case of *State ex rel. Gentry v. Montgomery*, 317 Mo. 811, 297 S. W. 30, 31, decided in 1927, it was held by the Supreme Court of Missouri, in construing a probation statute similar in its main aspects to the provisions of section 1203 of our Penal Code, that in the absence of an express limitation upon the power of the trial court to grant probation to a particular defendant after the affirmance of his appeal, it possessed such power so long as it retained jurisdiction of the cause.

"The cases which have arisen in federal jurisdictions following the adoption of the act of Congress known as the Probation Act of March 4, 1925 (18 USCA, Sections 724-727), the provisions of which act are in the main similar to the provisions of section 1203 of our Penal Code as it read prior to its two latter amendments, and as it now reads, have followed the same trend of liberal interpretation to the extent of uniformly holding that, in the absence of an express limitation upon the power of the trial court to hear and determine applications for probation at any time prior to the execution of sentence, the trial court possessed that power. *Nix v. James* (C. C. A.) 7 F. (2d) 591; *Kriebel v. United States* (C. C. A.) 10 F. (2d) 762; *Evans v. District Judge* (C. C. A.) 12 F. (2d) 64; *Ackerson v. United States* (C. C. A.) 15 F. (2d) 268; *United States v. Gargano* (D. C.) 25 F. (2d) 723.

"The question thus uniformly decided by the several Circuit Courts of Appeals before referred to finally made its way to the Supreme Court of the United States, wherein, and in the case of *United States v. Murray*, 275 U. S. 347, 357, 48 S. Ct. 146, 149, 72 L. Ed. 309, decided January 3, 1928, the opinion being delivered by Chief Justice Taft, it was held that the Federal Probation Act (28 USCA Sections 724-727) gives power to trial courts to grant probation to a convicted defendant by suspending the imposition or by suspending the execution of the sentence at any time prior to the execution thereof so long as the trial court retained jurisdiction over the cause. **It thus sufficiently appears that the uniform trend both of legislation and of judicial decision, state and federal, during the 10**

years which have intervened since the decision of the Beggs case, has been steadfastly in the direction of upholding the power of trial courts to grant applications of offenders for probation at any time prior to the actual execution of the judgment or sentence, in the absence of an express limitation upon the exercise of such power contained in the terms of the probation laws.

* * * *

"From the foregoing considerations we are of the opinion that it was the intention of the Legislature, by its last amendment of section 1203 of the Penal Code, adopted in 1927 (St. 1927, p. 1493) expressly removing the limitation of time imposed by the express terms of its earlier amendments, to invest trial courts with the power under said amended section to hear and determine applications for probation at any time prior to the execution of sentence, and that without reference to whether the defendant had in the meantime undertaken to prosecute a vain and unsuccessful appeal." (Emphasis supplied)

See also *People v. Superior Court*, 208 Calif. 692, 284 P. 451.

In *State ex rel. Conway, Attorney General v. Hughes, Circuit Judge*, 62 S. D. 579, 255 N. W. 800, the Supreme Court of South Dakota considered the probation law of that state as it related to a case in which a defendant has been sentenced to the penitentiary and actually had begun the service of his said sentence; and, after having served approximately six months, the defendant petitioned the trial court for probation under the provisions of the Probation Act. Order was made granting probation, and the Attorney General applied to the Supreme Court for certiorari to determine the question of the authority, jurisdiction and power of the trial court to make the order of probation.

Judge Campbell, speaking for the court, said:

"Holding therefore that the present constitutional provision and statute authorize trial courts in the case of first offenders to suspend the operation and execution of sentence after imposition, we come to a further inquiry suggested in the Caldwell Case, namely, 'At what point of time subsequent to the pronouncement of a sentence does the power to suspend the execution thereof terminate?'"

"Must the power of suspension be exercised at the time the sentence is imposed, or can it be exercised at any time prior to the completed execution of the sentence, or does the power of suspension expire at some point of time intermediate between those two limits, and, if so, when? ***"

"It is clear that the people of this state by the adoption of the constitutional amendment of 1930 intended to authorize the Legislature to grant to courts of this state a power which such courts had not previously enjoyed and which the Legislature (as this court had determined) could not previously have extended to them. Neither the constitutional amendment nor the statute thereafter enacted purports to fix a specific time of limit of time for the exercise of the power of suspension. On the other hand, neither the statute nor the constitutional amendment purports to establish or extend the period of time during which trial courts

normally and according to our regular procedure retain jurisdiction in criminal cases. The constitutional amendment and statute undertake merely to grant to trial courts (and the judges thereof) a new power of action concerning certain criminal cases. **It seems reasonable therefore to hold that this new power of action thus granted to trial courts was intended to and may be exercised at any time while such courts retain a sufficient jurisdiction of the cause to permit any action therein.** Under our practice the trial court retains at least some degree of jurisdiction over a criminal case until the case is removed by appeal or the time for appeal has expired. The trial court retains sufficient jurisdiction even after commitment in execution of the sentence to permit, hear, and pass upon a motion for new trial in proper case at any time prior to the complete finality of the judgment by expiration of the time for appeal therefrom. Section 4946, Rev. Code 1919. Conceding that, as against an unwilling defendant, a valid sentence cannot be increased in severity after he had commenced the serving thereof (see note, 44 A. L. R. 1203; note, 70 A. L. R. 822), we are entirely unable to perceive why the mere fact of commitment and partial execution of sentence should operate to bar the power of suspension at the request of or with the consent of the defendant. Neither do we perceive any magic in the expiration of the term of court at which the sentence was imposed or the opening of a succeeding term. Today, under our practice, such a distinction is archaic and meaningless. It arose at the common law when courts could exercise no judicial functions save in term time. That is no longer the rule with us, and since territorial days our circuit courts have been always open for the transaction of all court business save only the trial of issues of fact, and indeed since chapter 81, Laws Dak. 1887 (which later became, in substance, section 2117, Rev. Code 1919), there have not been, either in North Dakota or South Dakota, any 'terms of courts' in the common-law sense of the words. *Martinson v. Marzolf* (1905) 14 N. D. 301, 103 N. W. 937; *King v. McClung* (1895) 7 S. D. 67, 63 N. W. 219. As pointed out in the *Caldwell Case*, the power of suspension of sentence is not strictly or inherently a judicial power. It was conferred upon the courts by the Legislature pursuant to affirmative constitutional authority without any express statement or provision as to time or time limit for the exercise thereof. We doubt if this newly granted power of suspension could be exercised by a court after it had completely lost all jurisdiction over the cause, but we see no valid or convincing reason why such power may not be exercised at any time while the court continues to retain some degree of jurisdiction over the cause, as, for instance, sufficient jurisdiction to hear and rule upon a motion for new trial. We are therefore of the opinion that the power of suspension conferred upon trial courts by chapter 126, Laws 1931, may lawfully be exercised by such courts in any criminal case within the purview of such statute at any time prior to complete loss of jurisdiction over the cause either by removal of the cause to a higher court by appeal or by the expiration of time for appeal from the judgment.

"In the instant case no appeal had been taken and the time for appeal had not expired when the suspension order was made on April 2, 1934. It follows that the circuit court had jurisdiction to make and enter said order, and, this proceeding going only to jurisdictional questions and this court being of the opinion that the circuit court of Stanley County has regularly pursued its authority in the premises, it will be the judgment of this court that said order stand affirmed. The stay of proceedings embraced in the writ of certiorari herein will be vacated and the record certified to this court from the circuit court of Stanley County

will be immediately remitted to said court with a copy of the judgment of this court.'

In *Ex Parte Bost*, 214 Calif. 150, 4 P. (2d) 534, the Supreme Court of California considered a case in which, after conviction and sentence to the penitentiary, the defendant appealed, but elected to serve the sentence pending his appeal. After affirmance and while he was confined in the state penitentiary under his said election to serve pending appeal, he applied to the trial court for probation, which application was granted. The penitentiary warden declined to release the defendant upon said order of probation, for the reason that he was advised and believed that the order was void in that the court had no jurisdiction to grant the order after the defendant had begun the service of his sentence.

There the court said:

"The foregoing statement of facts presents the question of the jurisdiction of the Superior Court to entertain and act upon an application for probation after a judgment of conviction in a felony case has become executed so far as that court is concerned. It must be noted that no stay of execution was ordered by the trial court as provided by section 1243 of the Penal Code or otherwise. Upon the pronouncement of the judgment, a certified copy thereof without further order of the court was required to be issued to the sheriff for execution of the judgment. Section 1213, Penal Code. It thereupon became the duty of the sheriff to deliver the defendant to the warden of the state prison. Section 1216, Penal Code. This was done. When so delivered, the term of imprisonment, pursuant to the judgment, commenced to run. Section 670, Penal Code. Thereafter it continued to be the duty of the warden to hold the petitioner until his release by order of the state board of prison directors under the indeterminate sentence law (section 1168, Penal Code), or until otherwise legally discharged from his custody. When the petitioner was delivered to the warden by the sheriff, he was permanently removed from the jurisdiction of the Superior Court except in certain contingencies, one of which is specified in section 1333 of the Penal Code, wherein it is provided that the prisoner in the custody of the warden shall, upon a proper showing and an order of court, be temporarily released to the sheriff of the county wherein the testimony of the prisoner is required in a criminal action. The custody of the prisoner by the sheriff under this section must necessarily be temporary, qualified by and limited to the purposes of said section. The jurisdiction of the Superior Court over the prisoner would likewise be so limited. The order for such temporary removal could not have the effect of depriving the state board of prison directors of the right and power to fix the term of imprisonment of the petitioner under section 1168 of the Penal Code. The policy of the law and its wise administration would prevent such confusion of powers as would otherwise obtain.

"Upon the affirmance of the petitioner's appeal and the filing of the remittitur, the Superior Court was reinvested with jurisdiction to make all orders necessary to carry the judgment into effect. Section 1265, Penal Code. Here there was no order to make, for the judgment had theretofore become executed so far as the Superior Court was concerned. If the certificate staying execution as provided for in section 1243 of the Penal Code had been issued by the trial court, the petitioner would have remained in the custody of the sheriff, the judgment would not have become executed, and the custody and control of the warden and the state board

of prison directors would not have attached. Upon the affirmance of the appeal in such case, the Superior Court would order the commitment to issue or could entertain an application for probation as provided in section 1203 of the Penal Code, as said section was construed in *Lloyd v. Superior Court*, 208 Cal. 622, 283 P. 931.

"The petitioner places great reliance on the *Lloyd Case*, but it is not a parallel case, and does not afford a precedent for the relief which he seeks. In that case the judgment had not become executed either in whole or in part. The trial court had granted a writ of probable cause which had the effect of staying the execution of the judgment under section 1243 of the Penal Code, and the defendant remained in the county jail pending his appeal. In the opinion in that case the court was particular in pointing out that the trial court had the power, under the amended section 1203 of the Penal Code, to hear and determine applications for probation made prior to the execution of judgment. Such is not this case. Here no stay of execution was granted and no application for probation was made before execution of the judgment.

"Cases from other states relied upon by the petitioner are not helpful. In none of them do we find that the power of the trial court to recall the defendant from state's prison, there held under a valid judgment for the purpose of granting probation, has been sustained. It has been held in this state that the trial court is without the power, after a valid judgment is in the process of execution, to set it aside and pronounce a new judgment. *People v. Conley*, 27 Cal. App. 362, 150 P. 412, 413."

The Supreme Court of Alabama has not passed upon a case which involves an interpretation of the amendment to Section 124 of the Constitution proposed by Act No. 8, S. 4, passed March 29, 1939 (General Acts, Special Session, 1939, page 8) and of the enabling act thereunder, Act No. 278, S. 198, *supra*.

Section 5284 of the Code of Alabama, 1923, which invests courts with a limited power of suspension of sentence in certain cases has been upheld by the Alabama courts in *Barrett v. State*, 18 Ala. App. 246, 90 So. 13, certiorari denied, 206 Ala. 698, 90 So. 925; *Clark v. State*, 20 Ala. App. 472, 102 So. 916.

Act No. 46, H. 300, approved September 28, 1932 (Acts, Extra Session, 1932, page 54) which purported to invest courts having original jurisdiction of criminal actions with power, in certain cases, to suspend the imposition of or to suspend the execution of sentence and to place the defendant on probation, was declared unconstitutional by the Alabama Supreme Court, in its response to the certified questions of the Court of Appeals in *Montgomery v. State*, 231 Ala. 1, 163 So. 365, which response was concurred in by all the justices; and in the application of the State for certiorari to review the Court of Appeals' decision (26 Ala. App. 334, 163 So. 371) in that case, 231 Ala. 41, 163 So. 377, in which the late Chief Justice Anderson and Justices Thomas, Brown and Knight concurred in upholding the Court of Appeals' decision based upon such Supreme Court response, and in which the present Chief Justice (then Justice) Gardner and Justices Bouldin and Foster dissented. Cf. also *Reynolds v. State*, 28 Ala. App. 246, 181 So. 979.

Although the expressions of Mr. Justice Knight in the response, cited *supra*, and particularly in Subsection 4 thereof, tend to illustrate the purpose and intent to limit the powers of courts to suspend sentences to the specific

cases contemplated by the common law and by the statutes, it must be kept in mind that the Justice was there writing to the question in inherent power of the courts in such cases.

The Montgomery cases arose prior to the amendment to Section 124 of the Constitution, *supra*, and, in my opinion, are not authoritative upon the questions here considered.

In *Law v. State*, 238 Ala. 428, 191 So. 803, the Supreme Court in an opinion by Mr. Justice Foster, in which all of the justices concurred except Mr. Justice Knight who did not sit, construed Sections 4479 et seq. of the Code of Alabama, 1923, relating to the authority and power of courts exercising original jurisdiction in cases of the statutory offense of a parent failing to support a dependent child, to place on probation persons convicted thereof. In upholding the provisions relating to suspension of sentence and granting the benefits of probation, and court distinguished the Montgomery cases, *supra*. It said:

"In the Montgomery case, *supra*, this Court was dealing with Section 124, Constitution, on connection with the ordinary criminal cases in our courts. * * * But there the question of punishment was the matter dealt with. It was with reference to crimes generally. The punishment imposed in such cases has a twofold purpose, (1) reformation of the convicted offender, and (2) a deterrent to others who might be disposed to commit such a crime. 16 Corpus Juris 1351, 15 Amer. Jur. 155.

"But the primary purpose of the acts now under consideration, so far as we are here interested, is to secure the present enforcement of a duty owing by a parent to his child. * * * Criminal statutes have no such purpose. The punishment here provided is only as an aid to such purpose. * * * It is a stringent proceeding in certain situations to cause payment of alimony and maintenance, similar to that required in equity. Temporary provisions for support pending the hearing on appeal may be made as in equity. * * *

"The order of suspension must be made as a part of the judgment and sentence to effectuate the purpose stated. It is an exercise of a judicial function in thus accomplishing the purpose sought, not an executive. The proceeding is not to lessen or ameliorate the punishment or reform the offender, but to direct the proceeds of its enforcement, or as a substitute for its enforcement.

"Executive paroles are provided for their effect on the convict himself to secure a moral reformation of him. * * * A judicial suspension on the conditions and for the purpose here named is for the purpose of benefitting the persons neglected by the delinquent defendant. The two have nothing in common in their design. The power given by section 124, Constitution, to the Governor is an executive parole, such as above stated, and is for its effect on the offender. * * *

This case is not, however, authoritative upon any question here considered. Quotations in extenso from the cases decided by the courts of last report in other jurisdictions are cited hereinabove, for the purpose of demonstrating that the probation laws are practically universally construed to authorize the courts empowered to suspend the imposition of the execution

of sentence and to place persons convicted on probation, to exercise that authority and power at any time prior to the beginning of the execution of the sentence by the person so convicted. Cf. *Knight v. State*, 61 Ala. 482.

Some of the cases tend to limit this power unless the action is taken during the term of court at which the defendant was convicted. Other cases declare that the beginning of the execution of the sentence is the sole time limitation, without reference to the term of court within which the power is exercised, either before or after appeal. The case of *State, etc. v. Hughes, etc.*, supra, decided by the South Dakota Supreme Court, is a case which has come to my attention which goes to the extreme of declaring that the power may be exercised at any time that the trial court retains any modicum of jurisdiction over the case, even after the conviction person has begun the execution of his sentence.

Attention is invited to the fact that Section 6667 of the Code of Alabama, 1923, which provided for two terms of the circuit courts of this State, the one beginning on the first Monday in January and ending on the last Saturday in June of each year and the other beginning on the first Monday after the fourth day of July and ending on the last Saturday before Christmas of each year, has been amended by Act No. 56, H. 39, approved March 26, 1936 (General Acts, Extra Session, 1936, page 32) to read as follows:

"6667. CIRCUIT COURTS WHEN OPEN.—The Circuit Courts of the several Counties of the State shall be open for the transaction of any and all business, or judicial proceedings of every kind, at all times."

So that there are no "terms" of court, as heretofore provided for.

Reference is also made to Section 6670 of the Code, which provides in part that:

"* * * after the lapse of thirty days from the date on which a judgment * * * was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day."

The courts have construed this section to mean that after the expiration of thirty days the court loses general jurisdiction over the case.

Attention, however, is called to Section 3251 of the Code of Alabama, 1923, which provides:

"Section 3251. Trial court retains jurisdiction on appeal.—Where an appeal is taken from the judgment of any court or circuit court in criminal cases, the trial court retains jurisdiction for the purpose of granting a motion for a new trial; and also retains jurisdiction for the purpose of enforcing its judgment where the appeal is dismissed before the judgment of the appellate court is rendered." (Emphasis supplied)

It will also be noted that Section 6105 of the Code of Alabama, 1923, has been amended by Act No. 283, H. 433, approved September 2, 1935 (General Acts, 1935, page 690) to read as follows:

"6105. APPEALS IN CRIMINAL CASES.—Appeals in criminal cases must be taken at the time of sentence or confession of judgment, or within six months thereafter in manner following: (a) An entry of record that defendant appeals from the judgment with or without suspension of judgment, as he may elect, to be taken at the time of judgment rendered, or: (b) The filing of a written statement signed by the defendant or his attorney that defendant appeals from the judgment; the statement to be filed within six months; **provided, however, that the trial Court shall retain jurisdiction of the cause for the purpose of hearing and determining a motion for a new trial, seasonably made, and any appeal from a judgment of conviction shall also raise the question of the correctness of the Court's ruling on a motion for a new trial made within the time allowed, and in the manner prescribed by law.**" (Emphasis supplied)

In *MacMahon v. Dozier*, 237 Ala. 574, 187 So. 710, the Supreme Court considered a civil case in which the appeal was taken by the filing of supersedeas appeal bond in the office of the clerk of the trial court while a motion for new trial was pending in such trial court and before it was acted upon. The court there said:

"This appeal was taken by supersedeas appeal bond while the motion for a new trial was pending and before it was acted upon. Such appeal had the effect of removing the cause from the jurisdiction of the circuit court, so that it had no right or power thereafter to act upon the motion. *Lewis v. Martin*, 210 Ala. 401, 98 So. 635; *Sharp v. Edwards*, 203 Ala. 205, 82 So. 455; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200, 16 So. 693.

"**This rule has been modified as to criminal cases.** Section 3251, Code; see Gen. Acts 1935, p. 690. But it still obtains in civil cases. See last sentence in section 6101, Code." (Emphasis supplied)

So that, in criminal cases the circuit court retains jurisdiction for certain purposes, notwithstanding the fact that more than thirty days may expire after the date of judgment, and notwithstanding appeal from the judgment, before the trial court exercises the jurisdiction which it retains.

In my opinion, Section 6670, quoted *supra*, is not an absolute limitation upon the authority of trial courts over its judgment in criminal cases after the expiration of thirty days therefrom, or after appeal, to the extent that it forecloses the exercise of its authority in the suspension of the execution of sentences and in granting of probation in proper cases. See authorities, *supra*.

As relates to the power of trial courts in the second classification hereinafore referred to (that is to say, justice of the peace courts, inferior courts established in lieu of justice of peace courts, county courts, recorder's courts, courts of common pleas, law and equity courts or other courts of inferior jurisdiction from whose judgments appeals do not lie directly to the Court of Appeals or Supreme Court), in my opinion, a different situation obtains.

Section 2 of the Probation Act, cited *supra*, provides procedure for the suspension of execution of sentence and the placing on probation of persons convicted in such courts. The only authority, jurisdiction or power which such courts have in probation cases is **to entertain** an application for proba-

tion, to stay further proceedings in the case, to certify the same to a court within the county which has the power to suspend execution of sentence and to grant the benefits of probation and to continue the bond executed by the applicant for probation or to require him to execute a new bond for his appearance before the court exercising the power to suspend execution of sentence and to grant probation. Said section provides in part as follows:

"No defendant shall be permitted to make request for the benefits of probation unless the same is made within one day after the imposition of sentence."

Patently, the quoted excerpt from Section 2, *supra*, fixing a limitation upon the time within which application may be made for suspension of execution of sentence and for the benefits of probation applies only to persons convicted in inferior courts which do not have the authority, power or jurisdiction to suspend execution of sentence and to place such persons on probation. This is evident when one considers that the time for appeal from judgments of such courts to the circuit court or other court exercising general jurisdiction within the county is limited.

In my opinion, said limitation contained in Section 2 clearly was not intended by the Legislature to apply to cases in which convictions were had in courts which are invested with the power to suspend execution of sentence and to grant the benefits of probation.

For the reasons indicated in answer to your first inquiry, your second inquiry cannot be answer categorically.

If a defendant is convicted in the circuit court, his application for suspension of execution of sentence and for probation may be acted upon by the circuit court at any time before he begins the execution of his sentence. See authorities cited hereinabove in answer to your inquiry numbered one. Of course, under the provisions of Section 3 of the Probation Act, the authority after conviction "to continue the cause for such time as may be reasonably necessary to enable the probation officer to make his investigation and report" necessarily carries with it the power to release the defendant on bond pending such investigation and report.

However, if said defendant is convicted in an inferior court which does not have the authority to exercise the powers of suspension of execution of sentence and of probation, his application cannot be considered and acted upon by the circuit court unless he makes his application to such inferior court in which he is convicted within one day after the imposition of its sentence upon him. Of course, if he makes the application within the time provided in Section 2 of the Probation Act, quoted, *supra*, the circuit court, after the case is certified to it by trial court, may consider such application at such time and under such rules and regulations as it may determine upon.

Answering your third inquiry, your attention is directed to Section 3250 of the Code of Alabama, 1923.

This section is a limitation upon the absolute right of a defendant to dismiss his appeal. If, however, a defendant appeals from a judgment of conviction in the circuit court and dismisses the appeal, in the manner pro-

vided by said section, cited next above, the circuit court has authority and jurisdiction under the Probation Act to consider and act upon said application, at any time before the execution of the sentence is begun.

And if in such a case the Court of Appeals, of its own motion or on the application of the appellant or of the state, dismisses the appeal, the circuit court has like authority and jurisdiction to consider and act upon the application for probation.

Your inquiry numbered four has, in effect, been answered by the discussion of the authorities in answer to your inquiry numbered one.

Answering the same categorically, it is my opinion that after an unsuccessful appeal to the Court of Appeals from a judgment of conviction in the circuit court, said circuit court has authority and jurisdiction to consider and act upon an application for probation at any time prior to the beginning of the execution of the sentence imposed upon him.

In arriving at the conclusions herein announced, I have considered Section 7 of the Probation Act. It provides:

"Section 7. That this act shall not authorize the suspension of sentence and probation in the case of any defendant whose sentence began prior to the effective date hereof."

Considered alone, the provision quoted next above might be interpreted to mean that courts exercising the power to suspend execution of sentence and to grant probation were invested with authority, jurisdiction and power to entertain and act upon applications of persons who actually began the execution of their sentences *after* the effective date of the Probation Act, that is to say, after August 24, 1939. But when all of the provisions of the act are considered, such interpretation cannot prevail. This is accentuated when it is kept in mind that the Legislature was considering the Probation Act at the same time that it had under consideration Senate Bill 186, which provided for a State Board of Pardons and Paroles with authority and power to act in cases where persons convicted of crime were in the custody of the prison authorities in execution of the sentences imposed upon them. This bill was enacted into law on August 25, 1939, *one day* after the effective date of the Probation Act. See Act No. 275, S. 186, approved August 25, 1939 (General Acts of 1939, page 426).

When these related subjects of legislation, enacted into law at the same session of the Legislature, are considered together, it is apparent that Section 7, quoted *supra*, is not the expression of legislative intent at odds with the conclusions herein announced.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 13, 1940.

Hon. Frank C. Manning,
Tax Collector,
Madison County,
Huntsville, Alabama.

Taxation—Tax Sales—

Buildings on real estate owned by lessee should be assessed by lessee as realty as it is an interest in the realty, and when the taxes are not paid on the same, it should be sold as any other interest in realty is sold, i. e., as provided by Section 177 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion under date of May 20, 1940, follows:

"I have two assessments where there is a building on leased land, the taxes on the land having been paid by the owner of the land, but the taxes on the buildings are still unpaid and I have been unable to collect the taxes so far. Will you please advise me as to the best method to begin collection of these taxes. Should I levy on the buildings and sell the buildings the same as I do personal property or should I advertise and sell as Real Estate?"

I am not passing on the validity of the lessors' and lessees assessments, but am assuming that the buildings on the real estate were owned and assessed by the lessees as realty.

In my opinion, for the purpose of taxation, the buildings are an interest in the realty and, being assessed by the lessees as real property, when the taxes are not paid you should proceed to sell the same as you would any other interest in realty.

Section 1 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, p. 256), provides, in part, as follows:

"Section 1. That whenever the terms mentioned in this Section are employed in this Act, they are employed in the following sense: (a) The term 'Property' includes real and personal property. (b) The term 'Real Property' shall be held to mean and include not only land, city, town and village lots, but also all other things thereunto pertaining, and all structures, and all other things so annexed or attached thereto as to pass to a vendee by the conveyance of the land or lot. * * *"

Subsection (a) of Section 10 of said act provides as follows:

"Section 10. The subjects of taxation, except as exempted by law, shall be as follows: (a) Every piece, parcel, tract or lot of land in this

State, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee or special interest in any land, such as mineral the right to mine minerals; timber, and the right to turpentine; oil or petroleum, natural gas and the right to remove same from the soil, or any other interests when such interests are owned by persons other than the owner of the surface or soil, except growing crops."

In Cooley on Taxation, Vol. 3, 4th Edition, at page 2146, it is said:

"Where land is owned by one person and buildings thereon by another, the two are to be separately assessed, and the assessment of the buildings as real estate is proper in some states."

In 61 Corpus Juris, page 631, paragraph 778, it is said:

"Machinery, Improvements, and Fixtures. Generally speaking, an assessment of real estate may and should include fixtures, structures, and improvements on the land. However, where land and buildings thereon are separately owned they are to be separately assessed to the respective owners thereof, and under some statutes the buildings are to be assessed, in such case, as real estate, * * *"

In the case of **State v. Roden Coal Co.**, 197 Ala. 407, 75 So. 5, the question before the court was the kind of interests in real estate which were taxable under Section 2082 of the Code of 1907, which provided, in part, as follows:

"Every piece, parcel, tract, or lot of land in this State, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto, as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil."

I call your attention to the fact that the provisions of Section 2082 of the 1907 Code were not as broad as Subsection (a) of Section 10 of Act No. 194, supra.

In this case the court said:

"The language of this statute is plain and unambiguous. The separate interest in any land, such as mineral or timber, is the subject of taxation under the express words of the statute, 'when such interest is owned by a person other than the owner of the surface or soil.' * * *

"Clearly, therefore, under the very language of the statute, according to sound principles, and in harmony with these well-considered cases, the person against whom the mineral rights of the property are assessed for taxation must be the owner, at least to the extent of a freehold interest. Indeed, this proposition does not seem to be controverted by counsel for the state in their brief; but their argument is based upon the theory that such contract there has been vested in the Roden Coal Company an estate in the coal in the mine leased, a proper subject of taxation. * * *

"* * * that the lease contract here under consideration created merely a leasehold interest in the lessee, a chattel real, and did not convey to the lessee any title to the coal in situ."

In the case of *Union Compress Co. v. State*, 41 S. W. 52, the Supreme Court of Arkansas in 1897, in passing on a similar question, held that buildings, machinery and fixtures situated on leased land and owned by the lessee should be taxable as real property. The Arkansas statute defining "real property and lands" provided as follows:

"The term 'real property and lands' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, with all things thereon contained, but also all buildings, structures and improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in anywise appertaining thereto."

See also *Milligan v. Drury*, 130 Mass. 428; *Nelson v. Kloster*, 277 N. W. 399.

In an opinion to Hon. C. P. Holman, Tax Collector, Escambia County, under date of June 13, 1935, Vol. 4-A, Office Edition, Opinions of the Attorney General, page 159, it was held that the tax collector was authorized to consider as real property fixtures, the removal of which would materially damage the realty. Also, in an opinion of this office to Hon. Lacy Edmundson under date of March 7, 1934, Biennial Report of Attorney General, 1932-34, page 527, it was held that fixtures to apartment houses should be taxed as real property. An opinion of this office under date of May 12, 1939, to Hon. John M. Graham, Tax Assessor, Jackson County, Quarterly Report of Attorney General, Vol. XV, page 125, held that after an assessment of real property, which does not include the improvements, has been made final, the improvements are not assessable as an escape.

The premises considered, it is my opinion that the buildings in question, being assessed as realty by the lessees, when the taxes are not paid you should proceed to sell the same as you would any other interest in real estate, i. e., as provided under Section 177 of the 1935 Revenue Act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 13, 1940.

Hon. Elmer L. Vinson,
Tax Collector,
Limestone County,
Athens, Alabama.

Taxation—Tax Collectors—Fees—Notices—

Revenue Acts, 1935, Sections 217 and 239.

Tax Collector required to serve notice on delinquent taxpayer as required by Section 217 of the Revenue Acts of 1935, and may omit the fee if he so desires if on a fee or commission basis.

Tax Collector should collect only one fee of twenty-five cents for serving notice on delinquent taxpayer although delinquent has more than one assessment.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of May 27, 1940, in which you request my opinion as follows:

"Section 239 of House Bill 324 mentions two different fees the Probate Judge is entitled to receive in connection with issuing notices and also signing decree of sale of real estate. The same section also says that the tax collector shall have 25c for serving each notice. Does this mean that the tax collector must charge this 25c or may he omit this charge if he desires? If he is compelled to charge it, should it be charged in each notice where the same taxpayer has several different assessments and has a notice for each assessment?

I call your attention to the pertinent part of Section 217 of Act 194, H. 324, approved July 10, 1935, (General Acts, 1935, p. 256) which provides:

"(a) On receiving such book as speedily as practicable the Judge of Probate shall issue a notice addressed to each person against whom any unpaid taxes are assessed as shown by such book, substantially in the following form: 'State of Alabama, (give name of county) county, (give name of taxpayer): The Tax Collector has filed in my office a list of delinquent taxpayers, and of real estate upon which taxes are due. You are reported as delinquent, and your tax amounts to (here give amount of taxes) with costs added. This is to notify you to appear before the probate court of said county at the next term thereof, commencing on Monday, the _____ day of _____, 19____, then and there to show cause, if any you have, why a decree for the sale of property assessed for taxation as belonging to you, should not be made for the payment of the taxes thereon, and fees and costs. (Here Probate Judge's signature). Judge of Probate.' Such notice must be served by the Tax Collector, or his deputy, on the person to whom it is addressed, and service of such notice may be made by handing a copy thereof to the party or to whom it is addressed, or his agent, or by leaving a copy thereof at the residence or place of business of such party, or his agent, or by sending a copy of said notice to the party to whom it is addressed, by registered mail, postage prepaid, marked 'for delivery only to the person to whom addressed,' and return receipt demanded addressed to the Tax Collector of the county; and with his endorsement thereon, showing how and when served, show his reason for not serving the same, it must be by the Collector, or his deputy, returned into Court on or before the first day of the next term thereof. * * *"

Section 239 of Act 194, supra, provides:

"For each notice to a delinquent property owner to show cause why a decree of sale should not be rendered, the Judge of Probate is entitled to a fee of twenty-five cents and for each decree of sale, twenty-five cents; the Tax Collector shall have twenty-five cents for serving each notice which may be given by registered mail with return receipt demanded, but for his attendance at court, he shall receive no pay; but in case of appeal, the sheriff and the clerk of the appellate court shall be entitled to the same fees as for services in like cases."

In answer to your first inquiry, it is my opinion that the statute places a mandatory duty on the tax collector to serve the notice required by Section 217 of the 1935 Revenue Act, *supra*. When the duty is performed the tax collector is entitled to the fee provided therefor by Section 259 of the 1935 Revenue Act, *supra*. However, in view of the fact that the fee is compensation which belongs to the tax collector, he is not required to collect the fee. This conclusion is based on an opinion of the Attorney General, rendered on October 27, 1938, Quarterly Report of Attorney General, Vol. XIII, page 41, wherein it was held that the limitation on the compensation to which tax collectors of this state are entitled, included in the 1935 Revenue Act, is unconstitutional. Prior to the rendition of the opinion just referred to, this office has held that it was incumbent upon the tax collector to collect all fees in view of the fact that his compensation was limited. Quarterly Report of Attorney General, Vol. II, page 280; Quarterly Report of Attorney General, Vol. XI, page 72.

In answer to your second inquiry, it is my opinion that only one fee may be charged for serving notices on a delinquent taxpayer regardless of the fact that such taxpayer has several different assessments. It will be noted that under the terms of Section 217, *supra*, the Judge of Probate addresses the notice to "each person against whom any unpaid taxes are assessed," which indicates the Legislature did not intend that a notice be issued for each separate assessment, but that one notice directed to a delinquent taxpayer to appear and show cause why the decree for the sale of property belonging to him should not be made is sufficient.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 14, 1940.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
Birmingham, Alabama.

Exemptions—

Property owned by the Presbyterian Home for Children, a charitable organization, is exempt from ad valorem taxation, without regard to the uses to which the income from said property is put.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

It has been called to my attention that the opinion rendered to you under date of August 19, 1938 (Quarterly Report of Attorney General, Vol. XII, p. 137) was predicated on an inaccurate finding of fact concerning the act incorporating the Presbyterian Home for Children and I, therefore, take this opportunity of correcting the conclusions there reached to the effect that the property of the Presbyterian Home for Children was not exempt from ad valorem taxation.

The statement appearing in the opinion of August 19, 1938, which I have found to be incorrect was that the original act which incorporated the Presbyterian Home for Children (Act No. 133, approved December 12, 1864, Acts, Alabama, 1864, p. 108) under the name of "The Orphans Home of the Synod of Alabama" "contained no exemption from ad valorem taxation or any other form of taxes."

It appears upon further examination of the act that added at the end of Section 4 thereof are the words "all the property of said corporation shall be exempt from taxation."

This being the fact, it is my opinion that the case of **Ware Lodge No. 435 etc. v. Harper**, 236 Ala. 334, 182 So. 59, 63, is analogous and should control.

It is, therefore, my opinion that the grant of the charter to "The Orphans Home of the Synod of Alabama," which is now the Presbyterian Home for Children, containing the exemption from taxation, effected a contract between the state and the corporation which could not be subsequently altered by statute. See **Ware Lodge** case, *supra*. You are, therefore, advised that the property of the Presbyterian Home for Children is exempt from ad valorem taxation without regard to the uses to which the income from said property may be put.

The opinion rendered to you under date of August 19, 1938, *supra*, being in conflict herewith is hereby overruled and held for naught and any attempts to collect taxes under such opinion or any assessments made thereunder should be voided.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 14, 1940.

Hon. Wilbur L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

1. In determining the distribution of monies to the beneficiaries of the Alabama Beverage Control Act profits, the 1940 census should be used, when it becomes available.

2. Profit for the first half year over and above one million dollars should not be paid to the municipal beneficiaries to more than the extent of \$100,000, which is one-half of the amount to which municipalities would be entitled if the maximum amount allowed were obtained from the profits of the State Liquor Stores.

3. Where profits are distributed to any of the named beneficiaries on a monthly proportion of profits earned, distribution of profits to such beneficiaries should be cut off after the profits have reached the sum of one million dollars for the first half year.

4. The Alabama Alcoholic Beverage Control Board should retain control over the excess to which the General Fund is entitled until the end of the calendar year, such excess to be used by the Board in making adjustments at the end of the calendar year if necessary, the balance being covered into the General Fund of the Treasury of the State.

5. In determining the method of the distribution of the 20% of the net profits of the State Liquor Stores to be paid to the municipalities in which States Stores are located, the entire net profits of the individual stores for the half year should be determined and then reduced proportionately for each store so that the total amount accruing to the beneficiaries for the entire year would not exceed two million dollars. (Act No. 401, H. 886, approved September 15, 1939, General Acts, 1939, page 526).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 8, 1940, in which you request my opinion as follows:

"There are several features of Act No. 401, H. 886, passed by the legislature and approved September 15, 1939, as affecting distribution of ABC stores profit which we feel should be clarified.

"Your opinion of these questions will be appreciated:

"1. Section 2 provides that a certain portion of net profit not exceeding \$200,000 shall be paid to the incorporated cities and towns 'according to the last federal census.' An opinion of the Attorney General, dated November 24, 1939, by Assistant Attorney General Garrett (see Quarterly Report of Attorney General, Volume XVII, page 314) indicates that the population shall be determined according to the last federal census, which is the last census report prior to the passage of the act, but that any cities incorporated subsequent to the 1930 census and prior to September 15, 1939, should be included at a population as determined in accordance with the provisions of Section 1747 of the Code

of Alabama of 1923, regarding census enumeration of inhabitants at the time of incorporation. We ask therefore if the 1930 federal census of incorporated municipalities and in addition the cities incorporated subsequent to the 1930 census but prior to September 15, 1939, will govern in all future distribution and payment of that portion of the profits irrespective of any subsequent federal census. For example, the 1940 federal census report will be available at least by the time for payment of profit for the year 1941. Notwithstanding the 1940 census, which will be the last federal census at the time such payment is made, will not the distribution of profit to incorporated municipalities continue to be based on the 1930 census and census of cities incorporated subsequent to the 1930 census but prior to September 15, 1939, unless and until changed by legislative act?

"2. Distribution of profit to incorporated municipalities is based on the assumption that profit for the last half of the year will equal the net profit of the first half. Given the assumption that the profit for the first half of 1940 will be in excess of \$1,200,000, thereby providing funds which will be available for payment of the entire \$200,000 which will accrue to the incorporated municipalities within one year, we request interpretation of the act as to what portion of the \$200,000 accrued to incorporated municipalities, if earned, should be paid to such beneficiaries for the first half of the year 1940. Since the act provides for payment to incorporated municipalities semi-annually and that the adjustment of profit between the first half and the second half shall be adjusted at the end of the year and since there is a possibility, whether or not a probability, that the profit for the second half will be any stated amount more or less than the profit for the first half, it appears that profit for the first half year should not be paid to incorporated municipalities to more than the extent of \$100,000, which is one half of the amount which is anticipated to be earned and accrued to such beneficiaries by June 30, 1940.

"3. The board adopted a policy of advancing payment to the state and county welfare departments of the monthly proportion of profits as earned. Since these agencies will not participate in profit in excess of \$2,000,000 for the entire year, we ask for an interpretation of the act as to whether or not we should cut off distribution of profit to these agencies after the profit has reached the sum of \$1,000,000 for the first half year and whether payment of profit monthly to these agencies during the second half of the year should be based on the assumption that the profit for the second half of the year possibly will be less than \$1,000,000. That is, should we put off disbursement of profit to the welfare departments after profit has reached the sum of \$1,000,000 for the first half year and then pick up with disbursement of profit to these agencies for the second half year without consideration that there is any amount of profit accrued in the first half which might be applied to these agencies in the second half?

"4. Section 1 of the act provides that the net profits up to and including \$2,000,000 shall be paid out to beneficiaries as specified in fixed percentages. Section 2 of the act provides that any remainder of profit in excess of \$2,200,000 for the year shall be paid into the State General Fund, and Section 2 further provides that payment to all beneficiaries shall be based on an estimate that the second half year will produce net profit equal to the first half. In the event the net profit for the first half of the year 1940 is in excess of \$1,100,000, would it not be the

proper procedure to pay \$1,000,000 to designated beneficiaries on the fixed percentage basis as set out in Section 1, pay incorporated municipalities to the extent of \$100,000 as provided in Section 2, and then hold any excess which might be accrued either to the general fund or to other beneficiaries, dependent upon the result of net profit for the second half, in order that adjustment to the beneficiaries mentioned in the act might be made at the end of the year to correct any error in the estimate made that the profit of the second half would equal the profit of the first half? For example, assuming a net profit of \$1,400,000 for the first half of 1940, various agencies would participate in \$1,000,000 of that profit on a fixed percentage basis as provided in Section 1 of the act. Either \$100,000 or \$200,000 of such profit, as determined by your answer to paragraph 2 above, would be paid to the several incorporated municipalities of the state. Given this assumption as stated above, would it not be the responsibility of the Board to retain control over the excess, which is the remaining \$200,000 or \$300,000 dependent upon your answer to paragraph 2 above, rather than to make such excess immediately payable to the State General Fund, thereby retaining control of funds from which adjustment of profit at the end of the year might be made to the various beneficiaries concerned?

"5. Section 1 provides that 'twenty per cent of net profits of each Liquor Store to be paid to the municipality in which such State Store is located.' This provision is further modified in Section 2 by limiting the portion of profit in which such beneficiaries shall participate to \$2,000,000. In order to carry out this provision of the act, there appear to be only two courses of action open to the Board for determining the portion of profit payable to municipalities in which state stores are located on the fixed percentage basis as provided in Section 1 with the limitation fixed at \$2,000,000 of the profit earned by the Board:

"(1) To determine the entire profit of state stores located in each municipality for the half year, then reduce the proportion of profit for each store in each municipality so that the total will not exceed \$2,000,000.

"(2) To allocate payment of the percentage of profit to the municipalities in which state stores are located out of the first \$2,000,000 earned by the Board.

"In either event the net profit accruing to each municipality will necessarily be reduced by a fixed proportion. For your information, we have been using the percentage of volume of sales as a method of distributing overhead expenses and administrative income to the various stores. Presumably the same proportion should be used in reducing individual stores profit accrued to the municipalities in which stores are located. In order to avoid any inequities in payment to municipalities in which stores are located, would it not be the correct procedure for the Board to determine the entire net profit of the individual stores for the half year and then reduce that amount proportionately for each store so that the total accrued to such beneficiaries for the entire year would not exceed \$2,000,000 using the same method for reducing the individual stores profit and have the municipalities participate by the same percentage method as has been used by the Board for distributing overhead expenses and non-operating income?"

In my opinion, your first inquiry should be answered in the negative.

In the opinion to which you refer, rendered to Hon. I. C. Heck, State Comptroller, Capitol, under date of November 24, 1939, Quarterly Report of Attorney General, Vol. XVII, pages 314, 317, it was stated:

"You are advised that in determining the distribution of the monies made available to the various municipalities of the state by the acts, supra, you should use the population according to the federal census of 1930 in all instances where a federal census was taken in 1930, and in all instances where the municipality was incorporated since 1930 and no federal census was taken in 1930 you should use the population as determined by the census taken at the time of incorporation in accordance with the provisions of Section 1747, supra."

While this conclusion is correct and is here adhered to in so far as hereinafter limited, it will be noted that the particular question now presented, i. e., whether, after the 1940 census is available, the distribution should still be made according to the census of 1930, was not directly considered in the opinion to Mr. Heck.

You will note that Act No. 401, H. 886, approved September 15, 1939, (General Acts, 1939, page 526) in Section 2 provides for the future distribution of the particular net profits, therein dealt with, to the several cities and towns "on the basis of the ratio of the population of each such city or town to the total population of all cities and towns, according to the last federal census."

The effect of this provision is prospective in its operation, that is, it requires that the future distribution of the funds to the cities and towns be made on the basis of their population "according to the last federal census." This in my opinion, means the census existing immediately preceding the act of distribution rather than that preceding the effective date of the act here considered. In short, the phrase "last federal census" applies to each succeeding census as it occurs. **Groves v. Board of Commissioners of Lake County**, 209 Ind. 371, 199 N. E. 137; **Bennett v. State**, 47 Okl. 503, 150 Pac. 198; **Board of Commissioners of Coal County v. Matthews**, 296 Pac. 481, (Okl.); **Hurley v. Cheshire**, 255 N. Y. Supp. 486.

It is true that a contrary conclusion seems, at first blush, to have been reached in the case of **Watts v. State**, 215 Ala. 95, 109 So. 762, but a careful reading of the opinion in that case will disclose the distinction. The question there presented for decision was whether an Act of 1915 reestablishing county courts and providing:

"The county courts, as then existing under the Code of 1907, are re-established in all counties of the State except in those counties which have a population of 50,000 or more according to the last preceding federal census."

applied to those counties which had 50,000 or more according to the 1920 census but which had less than that population in 1910. The Supreme Court held that the census of 1910 governed. It will be noted, however, that the 1915 Act there considered was not prospective in its operation, while here it

seems so to be. There the act reestablished courts in certain counties of the state of a certain population so instante upon the taking effect of the act, and referred to conditions then existing; while Act No. 401, supra, established nothing at the time but authorized future action only, and, as the words "according to the last federal census" have as much reference to the last federal census at the time the provisions of the act are invoked as they do to the last federal census at the time the act took effect, it is my opinion that at any time when the act is invoked the census then existing would control the method of distribution. Cf. **Bennett v. State**, supra.

Before answering your other inquiries, your attention is particularly directed to the language of Act No. 401, supra. Sections 1 and 2 read:

"Section 1. The net profits derived from the proceeds of the State Liquor Stores in each calendar year after the year 1939 under the provisions of the Alabama Beverage Control Act, up to and including two million dollars, shall be paid out semiannually and applied as follows: Fifty per cent shall be covered into the General Fund of the Treasury of the State; ten per cent shall be covered into the Treasury of the State to be used and the same is hereby appropriated exclusively for Old Age Pensions, and for other purposes of the State Department of Public Welfare. Ten per cent shall be covered into the Treasury of the State to the credit of the sixty-seven counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective general funds; ten per cent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions, and for the other purposes of the County Department of Public Welfare; twenty per cent of the net profits of each Liquor Store to be paid to the municipality in which such State Store is located.

"Section 2. If the net profits derived from the proceeds of the State Liquor Stores in any such calendar year under the provisions of said Alabama Beverage Control Act shall exceed the sum of two million dollars, such excess, up to and including two hundred thousand dollars, shall be apportioned among, and paid to, the several heretofore incorporated cities and towns in the state semi-annually on the basis of the ratio of the population of each such city or town to the total population of all cities and towns, according to the last federal census, and any remainder of such excess shall be covered into the General Fund of the Treasury of the State. Payments of the net profits of the first half of such calendar year shall be made to the above mentioned beneficiaries upon the basis of an estimate that the net profits of the last half of such year will equal the net profits of the first half thereof, and adjustments shall be made at the end of such year to correct any error in such estimate. Payments shall then be made to said beneficiaries after the end of such year according to such corrections for the year."

You will note that in Section 1 it is provided that the net profits derived from proceeds of the State Liquor Stores "shall be paid out semi-annually." In Section 2 of the act, it is provided that the net profits derived from the proceeds of the State Liquor Stores in any such calendar year, when in excess of two million dollars, shall be apportioned to the beneficiaries involved "semi-annually." It is further provided that payments of the net

profits for the first half of the calendar year shall be made to the beneficiaries upon the basis of an estimate that the net profits of the last half of the year will equal the profits of the first half thereof and adjustment shall be made at the end of each year to correct any error in the estimate.

It will be seen that the whole of the procedure as to distribution detailed in the statute is laid on a semi-annual basis. In short, in determining the proper answer to your inquiry, it should at all times be remembered that the act contemplates a division of the year into two parts, the first half of the year and the last half of the year.

Applying this reasoning to your second inquiry, you are advised that since the act contemplates the handling of the funds on a semi-annual, or half-year basis, the profit for the first half of the year should not be paid to the incorporated cities and towns to more than the extent of \$100,000, which is one-half of the amount of the total to which such incorporated cities and towns are entitled under the act. See Section 2, *supra*, where it is specifically provided that the excess, over two million dollars, **up to and including \$200,000**, shall be apportioned among and paid to the several incorporated cities and towns in the State semi-annually.

In answering your third inquiry, we do not pass on the propriety or legality of the policy adopted of advancing payments of the monthly proportion of profits earned to any of the named beneficiaries, such question not being here presented. Suffice it to say that, assuming such policy to be valid, you are advised that since the beneficiaries will not participate in the profits for the entire year in excess of two million dollars, the distribution of the profits to them should be discontinued after the profits have reached one million dollars for the first half year. Here again, the basis for the conclusion reached is the obvious purpose of the act to provide for the distribution of a sum or sums among the beneficiaries, one-half during the first half of the year and one-half during the second half of the year. If, by distributing the monies on a monthly basis, under the procedure for determining the proper proportion as detailed in your inquiry, one-half of the total amount allowed by the statute is distributed before the end of the first half of the year, then, in my opinion, distribution should be discontinued until the beginning of the second half of the year, i. e., July 1, at which time distribution should be resumed, based upon the assumption that the net profits of the last half of the year will equal the net profits of the first half. (See the provisions to this effect in Section 2, *supra*)

In my opinion, your fourth inquiry should be answered in the affirmative.

You will note from the quoted provisions of Section 2, *supra*, that it is provided that at the end of each year "adjustments shall be made * * * to correct any error in such estimate (that is, the estimate that the net profits of the last half of the calendar year shall be equal to the net profits of the first half of such year)." You will also see from reading Section 2 that it is provided therein that "any remainder of such excess (over the sum of two million dollars and after the distribution of \$200,000 to the beneficiaries therein named) shall be covered into the General Fund of the Treasury of the State." It having been decided hereinabove that the profits for the first half of the year should not be paid to more than one-half of the total amount allowed to the various beneficiaries, it necessarily follows that the amount of the excess over and above such total amount allowed to all beneficiaries could

not be determined until the end of the calendar year in question. Therefore, the provision that "any remainder of such excess shall be covered into the General Fund of the Treasury of the State" must be interpreted to mean, in the absence of any other time being set in the statute, that such excess should be covered into the General Fund of the Treasury at the end of the calendar year and not at the end of the first half of such year. This becomes clearer when it is remembered that it is provided that an adjustment shall be made at the end of the year to correct errors in estimates, for it was evidently from this excess that the Legislature intended the adjustment to be made and certainly if such excess were covered into the General Fund prior to the close of the calendar year no monies would be available to the Alabama Alcoholic Beverage Control Board to make the adjustments required.

In my opinion, the correct procedure for the Board to follow in determining the distribution of the 20% of the net profits of the State Liquor Stores to be paid to the municipalities in which such State liquor Stores are located would be for the Board to determine the entire net profits of the individual stores at the end of the first half year and then to reduce that amount proportionately for each store so that the total amount would not exceed one million dollars for the first half year, and then to apply to procedure outlined in your inquiry for determining the amount to be allocated to each municipality as its part of the net profits of the liquor store or stores located therein. The same procedure should be followed at the end of the second half year, again based on the one million dollar limit. It is my information that to use the method of allocation set out in your inquiry in paragraph 5(2) would result in an inequitable distribution from the standpoint of the larger municipalities, and no intention to effect such an equality can be attributed to the Legislature in the absence of a clear expression thereof. **Hogue v. Matthews**, 89 Ala. 308, 8 So. 241.

Your question regarding the manner of determining the percentage, i. e., whether the method used by the Board for distributing overhead expenses and non-operating income should be applied, presents an accounting rather than a legal problem. It would appear, however, that this method of determining the proportion for each store is a fair one, and I see no objection to its use.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 14, 1940.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Rubber stamp bearing a facsimile of the officer's signature may be used in filing papers or certifying records and decrees.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 31, 1940, in which you request my opinion as follows:

"Will you kindly render me an opinion as to whether or not it is valid for me to have a rubber stamp used to sign my name on papers filed in this Court for recording, as per attached sample.

"Will you also advise if it will be permissible to use this same stamp on signing of the Marriage License Record Book, and also on Degrees of Tax Sales."

My answer to both of your inquiries is in the affirmative.

It is not what is written on a paper that constitutes filing of the same. This is only prima facie evidence of the filing and may be rebutted by oral proof. A paper is filed when it is delivered to the proper officer and received by him for recording or to be kept on file. 25 Corpus Juris 1126; 15 Am. St. Rep. 294, 298; *Greenwood v. Warren, et al.*, 120 Ala. 71, 27 So. 559; *Pfirman v. Henkel*, 1 Ill. App. 145.

I am of the opinion that you may use a rubber stamp to mark any paper filed in your office, as writing includes typewriting and printing on paper. See Section 1, Code of Alabama, 1923, and cases there cited. *Johnson v. State*, 69 Ala. 593. Of course, the stamp must show a facsimile of your signature, which must be adopted as your signature. It was held in the case of *Commonwealth v. Ray*, 3 Gray (Mass.) 441, that "Words traced with a pen, or stamped, printed, engraved, or made legible by any other device, are writing," and "'Writing' or 'written' signatures includes signature printed or engraved, as well as those traced by pen." See also 58 Corpus Juris, 729, Section, Mode of Affixing Signature.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 17, 1940.

Hon. Asa Rountree, Jr.,
State Director of Airfield Development,
Alabama Aviation Commission,
Montgomery, Alabama.

Appropriations—Aviation Commission—

1. An appropriation for compensation of Assistant Director of Aeronautics cannot be used for other expenses of Aviation commission.

2. If compensation of Assistant Director of Aeronautics is increased as provided by law beyond amount appropriated for said compensation, the deficiency may be supplemented out of appropriations otherwise available for said purpose but cannot be paid from the appropriation to the Commission for "other salaries and other expenses."

3. Former definite appropriations to Aviation Commission superseded by Appropriation Act of 1939 (Act No. 247, S. 239, approved August 24, 1939, General Acts, 1939, page 411, Pamphlet).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 10, 1940, in which you request my opinion as follows:

"By instructions of Mr. Hayden Brooks, Chairman of the Alabama Aviation Commission, I am writing to request opinions on the following matters pertaining to the Alabama Aviation Commission.

* * * *

"1. The 1939 General Appropriation Bill (No. 247) (S. 239-Tucker) specifies the following appropriation for the Aviation Commission:

"(a) For compensation of the Assistant Director of Aeronautics \$3,000.00. (b) For other salaries and for other expenses, conditional upon the approval of the Governor, \$8,500.00."

"We wish to know (a) if this specific appropriation for the salary of the Assistant Director of Aeronautics can be used for other expenses, if the office of Assistant Director of Aeronautics becomes vacant. (b) Can the salary of the Assistant Director of Aeronautics be increased beyond the \$3,000.00 appropriated, from other funds of the Commission, subject to the approval of the Governor?

* * * *

"2. The Legislature, during its 1936-37 Special Session, passed an amendment to the State Aviation Act (No. 159) (S. 124 - Walton) appropriating to the State Aviation Commission \$6,500,000 annually for five years, effective with the fiscal year 1936-37. This Act was approved on March 2, 1937.

"The Aviation Commission operated under this appropriation during the fiscal years 1936-37, 1937-38 and 1938-39. This is to inquire if the Aviation Commission is entitled to the remaining two years of this appropriation in addition to the appropriation provided for it in the General Appropriation Act of the 1939 Session (No. 247) (S. 329-Tucker).

"The original act creating the State Aviation Commission (Regular Session, 1935) (No. 493) (S. 77 - (Will O. Walton) as well as the amendment (Special Session, 1936-37) (No. 159) (S. 124 - Walton) provides as follows:

"All funds now or hereafter credited to the "State Aviation Fund," are hereby appropriation for the use of the Commission in the effectuation of the purposes of this Act; provided no funds shall be disbursed under this Act until first approved by the Governor of Alabama."

I am of the opinion that your inquiries 1(a) and 1(b) should be answered in the negative.

The General Appropriation Act of 1939 (Act No. 247, S. 239, approved August 24, 1939, General Acts, 1939, page 411, Pamphlet) made an annual appropriation to the Aviation Commission as follows:

"For the Aviation Commission: (a) For compensation of the Assistant Director of Aeronautics, \$3,000. (b) For other salaries and other expenses, conditional upon the approval of the Governor, \$8,500."

The appropriation of \$3,000 for the compensation of the Assistant Director of Aeronautics was an appropriation for that specific purpose and, in my opinion, could be used for none other, except as provided for in Section 2 of the Appropriation Act of 1939, supra, which does not affect this particular inquiry. Likewise, the appropriations for "other salaries and other expenses" are earmarked and can be used only for the purposes enumerated. This is in accordance with Section 24 of Act No. 37, S. 87, approved September 27, 1932 (General Acts, 1932, page 35), known as the "Budget and Financial Control Act," which provides in pertinent part as follows:

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"Section 24. — APPROPRIATIONS WRONGFULLY EXPENDED: It shall be unlawful for any trustee, commissioner, director, manager, building committee, or other officer or person connected with any department, institution, bureau, board, commission or other State agency, to which an appropriation is made, to expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted, or to consent thereto. * * *

The compensation of the Assistant Director of Aeronautics is now fixed by the State Personnel Board under the provisions of the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, page 68, Pamphlet). If said Board, acting within its authority, fixes the compensation of an officer or employee of the State over the amount appropriated for the compensation of said officer or employee, this would not amount to an increase of that appropriation. However, any balance may be paid out of appropriations otherwise available for said purpose. In other words, there is merely a deficiency in the appropriation for the payment of a particular compensation, which may be supplemented by other appropriations that are available for said purpose. Cf. *Quarterly Report of Attorney General, Vol. I, page 109; Reynolds v. Taylor, 43 Ala. 420; Riggs v. Brewer, 64 Ala. 282.*

I wish to call your attention to Section 2 of the Appropriation Act of 1939, which provides as follows:

"Section 2. That any surplus remaining in any appropriation herein made from the General Fund for the payment of salaries in any office, department, bureau, board, commission, or other agency, after provision has been made for the payment of all salaries in that office, department, bureau, board, commission, or other agency for which the appropriation is made, may be transferred, on order of the Governor, to any other appropriation herein made from the General Fund for the payment of all salaries in any office, department, bureau, board, commission, or other agency when the appropriation herein made from the General Fund for the payment of salaries in that office, department, bureau, board, commission, or other agency is insufficient to pay all the salaries in that office, department, bureau, board, commission, or other agency according to the pay plan recommended by the Personnel Board, and approved by the Governor."

Under this section, any deficiencies between the compensation as fixed by law and the amount appropriated therefor may be supplemented in accordance therewith. However, in my opinion, said election applies only to transfer of appropriations for salaries from one department, etc., of the State to another department, etc., of the State, and not to a transfer within a department, etc. of the appropriations to a specific department, etc.

I am of the opinion that your inquiry 2 should be answered in the negative.

Section 3 of the General Appropriation Act of 1939, *supra*, provides as follows:

"Section 3. That, except as may be herein otherwise provided, the amounts herein specifically appropriated shall be in lieu of the amounts heretofore provided or appropriated by law for such purposes."

It will be noted that there is a specific appropriation in said act for the Aviation Commission. This being the situation, in my opinion, the former appropriations to said Commission are repealed by virtue of Section 3 quoted above. See *Riggs v. Brewer*, *supra*.

The definite appropriations to the Aviation Commission in the 1935 and 1936-37 Acts, referred to in your letter, are not, in my opinion, continuing appropriations as defined and discussed in the cases of *Southern Industrial Institute v. Lee*, 234 Ala. 404, 175 So. 365, and *In re Opinion of the Justices*, 234 Ala. 555, 276 So. 367. Said appropriations were available at all times to the Aviation Commission, although the disbursements of the Commission were subject to the approval of the Governor.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 17, 1940.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses — Transfer of dentist license.

Privilege license issued to dentist under Schedule 48 of Section 348 of Revenue Laws of 1935 may not be transferred.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 8, 1940, in which you request my opinion as follows:

"I respectfully request your opinion as to whether a privilege license issued to an orthodontic dental surgeon can be transferred to another orthodontic dental surgeon in accordance with Section 354 and Section 358 A and B of the General License Provisions of the Acts of 1935 under the following circumstances:

"Dr. A, to whom the license was issued, specializes in straightening children's teeth. This treatment usually requires from two to five years. Charge for complete treatment is decided on at the beginning and is paid on monthly installments.

"Dr. A has sold his entire business, including office equipment, accounts receivable, and goodwill to Dr. B. Dr. B will continue the treatment of Dr. A's patients."

In my opinion, there is no authority of law for the transfer of the license issued to the dentist in question. I presume that the license, which is sought to be transferred, is that imposed upon each person practicing the profession of dentistry by Schedule 48 of Section 348 of the Revenue Laws of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, pp. 256, 458). You will note from a reading of Schedule 48 that it is provided therein that "if such business is conducted as a firm or as a corporation in which more than one dentist is engaged, **each dentist so engaged shall pay the license as above stated, * * *.**"

It is clear that this Schedule imposes a license on a personal occupation or profession, rather than on a "business" as such. It is true that Section 358 of the Revenue Laws of 1935 provides in Subsection (b) that:

"A **business or privilege** for which such license is issued is, under actual sale, transferred to a new ownership in which case a transfer of license may be effected by application to the Probate Judge originally issuing such license and the payment of a fee of fifty cents."

However, this office has heretofore held that while the words "business or privilege" are used, the true intention of the Legislature in enacting the section was that the license had to be coupled or connected with a **business** which could be transferred by sale before a transfer could be allowed. See opinion rendered under date of November 23, 1939, to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, Quarterly Report of Attorney General, Vol. XVII, page 305. The conclusion reached in the Howard opinion, *supra*, may be strengthened by observing that Section 358 provides in Subsection (a) that:

"Every license shall be held to confer a personal privilege to transact the **business, employment or profession** which may be the subject of the license, * * * ." (Emphasis supplied).

while in Subsection (b) a transfer is allowed only as to the "business or privilege for which such license is issued." It will be seen, therefore, that when the Legislature provided for allowing a transfer of license it was careful to limit the subject of transfer to the business licenses, excluding those personal occupations, employments or professions upon which licenses were also levied by the provisions of the Revenue Laws. The obvious reason for such a limitation was that in many instances the licensee or holder of a professional license was required by other legislative enactments to have special qualifications before a license could be issued. This is particularly true of the instant case, for by Sections 325-360 of the Code of Alabama, 1923, as amended by Act No. 637, S. 363, approved September 6, 1927, (General Acts, 1927, p. 747) dentists are required to secure a certificate from the Board of Dental Examiners of Alabama before being allowed to practice.

The following Alabama cases and decisions of this office sustain the foregoing construction of the statute: **Southern Car & Foundry Co. v. State**, 133 Ala. 624, 32 So. 235; **Foshee v. State**, 15 Ala. App. 113, 72 So. 685, **Cert. Den.** 198 Ala. 689, 73 So. 999; **Power v. State**, 69 Ala. 10; **Jones v. Demopolis**, 78 Ala. 370; **Quarterly Report of Attorney General**, Vol. VI, page 145; **Biennial Report of Attorney General**, 1922-24, page 431; **Biennial Report of Attorney General** 1918-20, page 645.

Premises considered, you are advised that since a dental license is purely personal in nature it cannot be transferred.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 18, 1940.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Taxation — Mortgages — Record Filing Tax — Written Assignment executed to National Mortgage Association—

Written assignment to National Mortgage Association of mortgage executed to national bank and filed for record by said bank without the payment of the record filing tax is not subject to record filing tax prescribed by Schedule 46 of Section 348 of the Revenue Act 1935.

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of March 29, 1940, requesting an opinion as follows:

"Attached you will find correspondence I have had with the Federal National Mortgage Association, Birmingham, Alabama, relative to the payment of filing taxes on mortgages or deeds recorded by them in Coffee County. In the letter from this Association to me under date of March 27, 1940, Mr. E. W. Long, Agent, quotes a resolution of the United States Senate and House of Representatives dealing with Federal Loan agencies, among which is the Federal National Mortgage Association.

"Will you please give me your answer to the following question:

"Is the Federal National Mortgage Association liable for the payment of mortgage and deed filing taxes on such instruments recorded in the State of Alabama by this Association?"

From an examination of the correspondence attached to your inquiry, and into the report of examination of the affairs of the Probate Judge of Coffee County out of which the question arose, it appears that J. O. Rowe and wife, and S. H. Gibson and wife, executed their separate mortgages upon real estate to the First National Bank of Wetumpka to secure loans; and that the First National Bank of Wetumpka sold, transferred and assigned these two mortgages to the Federal National Mortgage Association by means of a written assignment for recited aggregate considerations of \$4,895.40. That the two written assignments executed by the First National Bank of Wetumpka to the Federal National Mortgage Association were filed for record by said association in the Probate Office of Coffee County, Alabama, on September 16, 1939, and were duly recorded in the records of that office.

It appears that, prior to the execution of the assignments by the First National Bank of Wetumpka to said association, the First National Bank of Wetumpka had caused said mortgages to be filed for record in the office of the Probate Judge of Coffee County, but that, inasmuch as national banks are exempt from the mortgage filing tax, no tax had been paid upon the mortgages.

So that the narrow question with which we have to deal is:

In the event a mortgage is executed to a national bank by an individual, and is offered for record by the national bank and is recorded without the payment of the record filing tax, is a written assignment of said mortgage executed by said national bank mortgages to the Federal National Mortgage Association subject to the record filing tax, when said assignment is offered for record by said association?

This office has held that filing tax does not attach upon the offering for record of a written assignment to the Reconstruction Finance Corporation of an unrecorded mortgage executed by and to private persons. Biennial Report of Attorney General, 1932-1934 page 460. And that upon the assignment to a private person by an instrumentality of the United States (which is exempt from taxation) of a mortgage executed to such instrumentality, the record of the assignment bears the filing tax. Biennial Report of Attorney General, 1930-1932, page 803; Biennial Report of Attorney General, 1934-1936, page 135. And that a written assignment to an instrumentality of the United States of an unrecorded mortgage executed between private parties is not taxable; but that when the mortgage was executed to private parties was not recorded by said private parties, and was subsequently assigned to an instrumentality of the United States and the assigned mortgage offered for record by that instrumentality, **the mortgage itself** is subject to the filing tax. Biennial Report of Attorney General, 1934-1936, page 632.

Schedule 46 of Section 348 of the Revenue Act of 1935 provides in pertinent part:

"No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state or which conveys any interest in any such property, **except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid** * * * shall (sic) not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record, to wit: (Here follows the schedule of the tax)." (Emphasis supplied)

Inasmuch as the two mortgages which were the subject of the written assignment from the First National Bank of Wetumpka to the Federal National Mortgage Association were executed to and filed for record by the First National Bank of Wetumpka, an instrumentality of the United States which is exempt from such taxation, no mortgage tax was paid upon their filing for record. So that, at the time of the filing for record by the Federal National Mortgage Association of the written assignment of said mortgages, the said assignment was not such as was excepted from the tax by the underscored portion of Schedule 46, quoted supra. And the written assignment was subject to the filing tax, unless some provision of federal law creating or authorizing National Mortgage Associations, or some independent provision of federal law, exempted it from the tax. Section 1722 of Title 12, U. S. C. A., as amended February 3, 1938, Chapter 13, Section 8, 52 Stat. 24, provides, in part, as follows:

"* * * Every national mortgage association, including its franchise, capital, reserves, surplus, **mortgage loans**, income and stock shall be exempt from taxation now or hereafter imposed by the United States, by any territory, dependency or possession thereof, or by any state, county, municipality or local taxing authority. Nothing herein shall be construed to exempt the real property of such associations from taxation by any state, county, municipality or local taxing authority to the same extent according to its value as other real property is taxed." (Emphasis supplied)

Section 1716, et seq., of Title 12, U. S. C. A., as amended February 3, 1938, by Chapter 13, Sections 4 and 5, 52 Stat. 23, and by Chapter 175, Sec-

tions 15 and 16, 53 Stat. 808, provide for the creation of and define the powers of national mortgage associations. Their principal functions are to make real estate loans which are acceptable for insurance or are insured under Section 1707, et seq., of Title 12, U. S. C. A., and to purchase, service, etc., mortgages which are subject to mortgage insurance under said provisions. As a matter of practice, in most instances the mortgage is executed by the property owner to a private mortgagee, and that mortgagee in turn transfers and assigns the mortgage to the national mortgage association.

In my opinion, when a written assignment of a mortgage is offered for record by the national mortgage association, which has the effect of assigning or transferring a mortgage executed by private individuals to a national bank, and upon which the mortgage tax has not been paid upon the filing of said mortgage for record by the national bank, the said written assignment is not subject to the record filing tax prescribed by Schedule 46 of Section 348 of the Revenue Act of 1935, supra. **Federal Land Bank v. Hubbard**, 163 Va. 860, 178 S. E. 16; **Pittman v. Home Owners' Loan Corporation, etc.**, 84 L. ed. 16, 60 Sup. Ct. 15, 124 A. L. R. 1263.

In the last cited case, Mr. Chief Justice Hughes, speaking for the Court, said:

"The second suggested distinction rests upon the terms of the Home Owners' Loan Act. That provides that the Home Owners' Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes. The critical term in the present relation, is 'loans.' We think that this term, in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security. The Home Owners' Loan Act requires that the loans made by the Corporation 'shall be secured by a duly recorded home mortgage.' Both the mortgage and its recordation were indispensable elements in the lending operations authorized by Congress. We agree with the state court that there is no sound distinction which makes inapplicable the reasoning which was decisive in the *Crosland Case*."

In my opinion, this reasoning is equally applicable to the case under consideration.

It must be kept in mind, however, that this exemption applies to written assignments executed by the mortgagees to the national mortgage association, only. If a mortgage was executed by a mortgagor directly to the national mortgage association, it would be exempt from the record filing tax under the reasoning of the Supreme Court of the United States in the *Pittman* case, supra.

If the mortgage was executed to a private mortgagee who is not exempt from the payment of the mortgage filing tax required by Alabama law, and the mortgagee assigned the same, prior to recordation, to the national mortgage association, the written assignment to such association would not bear the tax. But if the association offered the assigned mortgage itself for record, the exemption would not apply. See Biennial Report of Attorney General, 1934-1936, page 632.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 18, 1940.

Hon. Frank N. Julian,
Superintendent of Insurance,
Department of Commerce,
Montgomery, Alabama.

Insurance — Corporations — Taxation—

Where an insurance company, authorized to do business in Alabama, consolidates with a corporation not so authorized and the effect of the said consolidation is to create a new corporation, the new corporation, when it qualified to do business in Alabama, is subject to Section 160.5 of the Revenue Act of 1935.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of May 31, 1940, follows:

"The Bureau of Insurance respectfully requests your opinion on the following:

"The New Jersey Insurance Company, a corporation formed under the laws of the State of New Jersey, and licensed for business in this state, consolidated with the Jersey Insurance Company, a New York corporation.

"The consolidated company, then applied for license and was admitted under the name of 'The Jersey Insurance Company of New York.'

"Query: Under the above statement of facts should this Department treat the Jersey Insurance Company as a new company and apply the provisions of Section 160.5 of the Revenue Code of Alabama?

"We are attaching hereto copy of the Agreement of Consolidation and direct your attention to page 3 thereof, paragraph 6, whereby the consolidated corporation assumes all liabilities of the consolidating corporation.

"I am also attaching hereto our file of letters in this particular case, which we respectfully ask you to review. Will you kindly return the accompanying papers, together with your opinion?

"The Bureau of Insurance required the consolidated company to qualify as an entirely new company."

In answer to your inquiry, attention is first called to Schedule 160.5 of Section 348 of the Revenue Act of 1935 (General Acts, 1935, page 550), which is as follows:

"Schedule 160.5. After the insurance company has been operated in this State for one complete calendar year it shall compute its business done in Alabama during said year, and upon this basis it shall pay its taxes for that and the succeeding year. Each succeeding year the tax shall be based and paid on business done in Alabama for the preceding calendar year, as set forth in this Chapter."

It will be noted that the above schedule requires an insurance company, after it has qualified to do business in this State and has operated for a complete calendar year, to compute the amount of business done in the State during the first year and upon this basis pay taxes for that year and the succeeding year.

This now presents the question propounded by you; that is, whether or not the Jersey Insurance Company of New York is subject to the provisions of Schedule 160.5, supra. It is my opinion that this inquiry should be answered in the affirmative. A review of the facts set forth in your letter and the file thereto attached disclose that the New Jersey Insurance Company and the Jersey Insurance Company of New York, by agreement and pursuant to Section 129 of the insurance laws of the State of New York and Section 17:27-3 of the revised statute of the State of New Jersey, consolidated. The agreement of consolidation is in words and figures as follows:

"THIS AGREEMENT, made this 24th day of August, 1938, by and between NEW JERSEY INSURANCE COMPANY, party of the first part, and JERSEY INSURANCE COMPANY OF NEW YORK, party of the second part,

WITNESSETH:

"WHEREAS, NEW JERSEY INSURANCE COMPANY is a stock insurance corporation duly organized and existing under the laws of the State of New Jersey, having an authorized capital stock of One Million (\$1,000,000) Dollars divided into Fifty Thousand (50,000) shares of the par value of Twenty (\$20.00) Dollars, each, all of which shares are issued and outstanding, and

"WHEREAS, JERSEY INSURANCE COMPANY OF NEW YORK is a fire and marine insurance company duly organized and existing under the laws of the State of New York, having an authorized capital stock of (sic) Four Hundred (\$400.00) Dollars, divided into Four Thousand (4,000) shares of the par value of One Hundred (\$100.) Dollars each, all of which shares are issued and outstanding, and

"WHEREAS, JERSEY INSURANCE COMPANY OF NEW YORK is authorized to do the business specified in Sections 110 and 150 of the Insurance Law of the State of New York and NEW JERSEY INSURANCE COMPANY is duly admitted to the State of New York and is authorized to transact therein the business specified in said Sections, and

"WHEREAS, JERSEY INSURANCE COMPANY OF NEW YORK is duly admitted to the State of New Jersey and is authorized to transact therein the same kinds of insurance as transacted by NEW JERSEY INSURANCE COMPANY, and

"WHEREAS, NEW JERSEY INSURANCE COMPANY is the owner and holder of all of the capital stock of JERSEY INSURANCE COMPANY OF NEW YORK, or will be such holder prior to the consummation of this Agreement, and

"WHEREAS, it is deemed to be to the mutual interests of each of said corporations, and their stockholders, that said corporations be consolidated, pursuant to the provisions of the Insurance Law of the State of New York and the Revised Statutes of the State of New Jersey;

"NOW, THEREFORE, said NEW JERSEY INSURANCE COMPANY and said JERSEY INSURANCE COMPANY OF NEW YORK, in consideration of the mutual covenants herein contained, do hereby

"AGREE to consolidate and hereby agree upon and prescribe the terms and conditions of said consolidation, and the manner of carrying the same into effect, as follows:

"1. The name of said corporation hereby formed by said consolidation shall be JERSEY INSURANCE COMPANY OF NEW YORK, hereinafter called the CONSOLIDATED CORPORATION, and its domicile shall be fixed and located in the State of New York.

"2. The amount of capital stock of the CONSOLIDATED CORPORATION shall be One Million (\$1,000,000) Dollars, divided into Fifty Thousand (50,000) shares of the par value of Twenty (\$20.00) Dollars each, which capital is not larger in amount than the aggregate amount of capital stock of the Consolidating Corporations.

"3. The capital stock of NEW JERSEY INSURANCE COMPANY shall be convertible into the capital stock of the CONSOLIDATED CORPORATION hereby formed, by the issue and distribution of all the Fifty Thousand (50,000) shares of the par value of Twenty (\$20.00) Dollars each of said CONSOLIDATED CORPORATION pro rata and share for share to the holders of the shares of stock of NEW JERSEY INSURANCE COMPANY upon the presentation and surrender for cancellation of the stock of said NEW JERSEY COMPANY held by such stockholders, and not otherwise. All dividends payable with respect to shares of the CONSOLIDATED CORPORATION represented by unexchanged certificates for stock of NEW JERSEY INSURANCE COMPANY shall be withheld by the CONSOLIDATED CORPORATION until the exchange of such certificates for certificates of the CONSOLIDATED CORPORATION herein provided for has been made, and any accruals of the same caused by such withholding shall be paid to the record holder of such shares as of the date upon which the exchange is made.

"4. Inasmuch as all of the capital stock of JERSEY INSURANCE COMPANY OF NEW YORK is presently owned and held by NEW JERSEY INSURANCE COMPANY, no separate provision shall be made for the issuance to the stockholders of JERSEY INSURANCE COMPANY OF NEW YORK of any of the stock of the CONSOLIDATED CORPORATION, and all of such stock shall be issued as provided in paragraph '3' hereof.

"5. The Commissioner of Banking and Insurance of the State of New Jersey is hereby appointed and designated the true and lawful attorney of the CONSOLIDATED CORPORATION in and for the State of New Jersey upon whom all lawful process in any action or proceeding against the corporations involved in this consolidation may be served with the same force and effect as if the corporation formed by this consolidation were a corporation of the State of New Jersey.

"6. The CONSOLIDATED CORPORATION hereby assumes and agrees to pay and perform when and as payment or performance may be due all of the obligations, debts and liabilities of the consolidating corporations in the same manner as if they had been incurred or contracted by it and whether or not represented by agreements, contracts, policies of insurance or other instruments executed by or in the name of either of the consolidating corporations and whether or not entered into prior or subsequent to the date hereof.

"7. The Charter of said CONSOLIDATED CORPORATION hereby formed, under which it shall conduct its business, shall be as follows:

It is also necessary to state, for a clear picture of the question herein being considered, that prior to the said consolidation, the New Jersey Insurance Company had for a number of years been authorized and qualified to do an insurance business in this State and had met all the conditions imposed upon it. The Jersey Insurance Company of New York, however, was not qualified to do an insurance business in this State, but it is insisted that the said consolidation amounted merely to a change of name and domicile of the New Jersey Insurance Company, and, therefore, the Jersey Insurance Company of New York, as its successor, is not subject to the provisions of Section 160.5, *supra*.

While it is true that this office in an opinion addressed to Hon. Frank N. Julian, Superintendent of Insurance, dated August 4, 1939, Quarterly Report, Attorney General, Vol. XVI, page 124, held that a mere change in name of a corporation does not affect its rights, or lessen or add to its obligations; yet, a careful study of Section 129 of the Insurance Law of the State of New York (Cahill's Consolidated Laws of New York 1930, p. 1217), under which the consolidation herein being considered was admittedly effected, clearly shows that the effect of a consolidation, pursuant to the provisions of said section, is to create a new corporation and not merely to effect a change of name. Section 129, *supra*, says in part as follows:

"Upon such merger or consolidation, all the rights, franchises and interests of the corporations so merging or consolidating in and to every species of property and things in action belonging to them, or either of them, shall be deemed to be transferred to and vested in the **new corporation**, without any other deed or transfer, and the **new corporation** shall hold and enjoy the same to the same extent as if the old corporations, or either of them, should have continued to retain their titles and transact business. The **new corporation** shall succeed to all the obligations and liabilities of the old corporation, or any of them, and shall be held liable to pay and discharge all such debts and liabilities in the same manner, as if they had been incurred or contracted by it." (Emphasis supplied)

It will therefore be seen that in the State of New York the legal effect of the consolidation of the New Jersey Insurance Company and the Jersey Insurance Company of New York was the creation of a new corporation.

In 19 C. J. S. Section 1626 at page 1386, the following statement is found:

"The general rule is that a consolidation affects the dissolution of the original corporations and brings into existence a new corporation."

The Supreme Court of Alabama in the case of **Alabama T. & N. Ry v. Tolman**, 200 Ala. 449, 76 So. 381, in construing our statutes which authorize the consolidation of corporations, said:

"The consolidation of corporations, under statutes like ours, affects the dissolution of the original bodies, except for certain purposes specified, and the creation of a new one."

See also **State v. Atlantic Coast Line R. R. Co.**, 202 Ala. 558, 81 So. 60; **Meyer v. Johnson**, 64 Ala. 603, page 656.

Based upon (1) the express terms of the agreement of consolidation; (2) the New York statute (Section 129, *supra*) under which the consolidation was effected and (3) the general law and the law of the State of Alabama in reference to a consolidation of corporations, such as here involved, it is my opinion that the effect of the consolidation of the New Jersey Insurance Company and the Jersey Insurance Company of New York was to create a new and distinct corporation.

It is therefore my opinion that the Jersey Insurance Company of New York is a separate and distinct entity from the New Jersey Insurance Company, and therefore, when it qualified to do an insurance business in this State, it became subject to Section 160.5, *supra*.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 18, 1940.

Hon. C. J. Kettler,
Solicitor 2nd Judicial Circuit,
Luverne, Alabama.

Circuit Solicitor — Act No. 329, H. 147, approved August 31, 1939 (General Acts of Alabama, 1939, page 468).

1. County in which the Circuit Solicitor resides required to provide suitable offices for the use and occupancy of the Circuit Solicitor.

2. County governing body of Circuit Solicitor's residence authorized, under provisions of Section 186 of the Code of 1923, to reimburse Circuit Solicitor to the extent of a reasonable sum for amounts expended by him for office rent since passage and approval of Act No. 329, supra, provided said county governing body approves the location of the said solicitor's office.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of June 3, 1940 follows:

"I am writing for an official opinion.

"In the regular session of the Legislature a law was passed increasing the salary and duties of the several Circuit Solicitors of the State. In this law it provides that the Circuit Solicitors should be furnished, by the County in which they reside, suitable offices.

"Since the time this law was passed I have had an office here in Luverne, but not in the Court House and have been paying the sum of \$18.00 per month out of my own pocket as office rent, no office being provided for me by the County, and our Court House being crowded, there is no suitable office, except the jury rooms upstairs in the courthouse, and these being small rooms. I have paid the above sum as rent since this law was passed, and have not rendered a statement to the Commissioner's Court of the County for the amount I have paid as rent. I am wondering if I would be entitled to have my office rent paid by the county, and if so, could I be reimbursed for the amounts heretofore paid out by me, since the passage of the present law in August, 1939.

"I mentioned this matter to one of the State Examiners here, and he was of the opinion that, under the law, the county solicitor, and the Circuit Solicitor should occupy the same office in the courthouse. I disagree with him on this, and would also like to get an opinion on this. I would thank you to give me, at your earliest convenience, an opinion on the above matter."

You first request my opinion as to whether or not you, as Circuit Solicitor of the Second Judicial Circuit of Alabama, are entitled to be provided with suitable offices for use in your official capacity at the expense of the county of your residence. Also whether it is necessary that such office be occupied by you jointly with the County Solicitor.

In answer to the above request, I call attention to an opinion of this office addressed to Hon. R. H. Williams, Judge of Probate, Marshall County, Guntersville, Alabama, dated November 21, 1939, Quarterly Report, Attorney General, Vol. XVII, page 289. This opinion considered Section 3 of Act No. 329, H. 147, approved August 31, 1939 (General Acts of Alabama, 1939, page 468), which is the act referred to in your letter, and the following conclusion was reached:

"It is to be noted that this act does not contain any requirement that suitable offices for the use and occupancy of the circuit solicitor, to be located in the courthouse, if there is space available therein for such purposes, or that they be located in the county site, if there is no space available in the courthouse for such purposes. The only restriction is that such suitable offices be located 'in the county where such officers reside.' Therefore, it is my judgment that pursuant to the above quoted excerpt from Act No. 329, supra, the county governing body of a county in which the circuit solicitor resides may provide suitable offices for the use and occupancy of the circuit solicitor, the rent thereon to be paid by the county, at any place in the county which the governing body deems most advisable, regardless of whether or not there is sufficient space available in the courthouse for such purpose, and regardless of whether or not such suitable offices are located in the county site. It is my opinion that the question of where such suitable offices are located within the county of the circuit solicitor's residence is a matter that addresses itself entirely to the discretion of the county governing body of the county of his residence, which county governing body is charged by law with general supervision and control of the finances of the county."

You next ask whether or not you would be entitled to be reimbursed for the amount expended by you for office rent since the passage and approval of Act No. 329, provided your first inquiry is answered in the affirmative. The opinion to Hon. R. H. Williams, supra, holds that the county in which the Circuit Solicitor resides must furnish him with suitable offices and pay the rent thereon. It will be noted, however, that the location of said offices is left to the sound discretion of the governing body of the said county.

It, therefore, follows, and it is my opinion that the county governing body of your residence may approve the location of your present offices and would be authorized under the provisions of Section 186 of the Code of 1923 to reimburse you to the extent of a reasonable sum for the amounts expended by you in this connection since the passage and approval of Act No. 329, supra.

Section 186 is as follows:

"Section 186. Equitable claims or demands against county; mode of payment provided. — The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, to refund to any person, firm or corporation, money or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvements, tick eradication or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the coun-

ty was without authority to pay such claims on account of a defect in any law or any other reason."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 21, 1940.

Hon. H. E. Kendrick,
Tax Collector,
Dallas County,
Selma, Alabama.

Taxation — Escapes — Tax Assessor — Tax Collector—

1. Tax Assessor is entitled to commissions on escape assessments made by tax collector under the provisions of Section 189 of the Revenue Act of 1935.

2. Neither the tax assessor nor the tax collector is entitled to 50c fee on escape assessments made by the tax collector.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated June 12, 1940 follows:

"Please give me an opinion as soon as possible on the following points:

"(1) Is the tax assessor entitled to commissions on escape assessments made by the tax collector?

"(2) Is the tax assessor entitled to the 50c fee collected on escape assessments made by the tax collector, or does this fee go to the tax collector for making the escape assessment?"

My answer to your first inquiry is in the affirmative. Section 22 of the Revenue Act of 1935 reads in pertinent part as follows:

"Section 22. **TAX ASSESSORS COMMISSIONS.** The tax assessor shall, during the current term of the present incumbent of said office be paid commissions as now provided by law, after the expiration of the present term of the present incumbent of the office of tax assessor, the tax assessor shall be entitled to receive from the tax collector, out of the first money collected by him, giving him duplicate receipts therefor, one

of which receipts shall be forwarded to the State Comptroller by the tax collector, the following commissions," (Emphasis supplied)

It will be noted that the Tax Assessors are to be paid out of the first moneys collected, and that the rate of commission is based on collections. This, in my judgment, shows a legislative intention that the commissions of the tax assessors are computable on the taxes actually collected and not on the gross levy based on assessed valuation. — See **Crowe v. Board of School Commissions**, 228 Ala. 107, 152 So. 26; **Biennial Report of Attorney General** 1930-32, p. 1033; **Quarterly Report Attorney General**, Vol. XVI, page 149.

It is, therefore, my opinion that the tax assessor would be entitled to commissions on escape assessments made by the tax collector under the provisions of Section 189 of the Revenue Act of 1935.

My answer to your second inquiry is in the negative. Section 54 of the Revenue Act of 1935 reads in pertinent part as follows:

"Section 54. The assessor shall be entitled to a fee for making returns of property which has escaped taxation of fifty cents for each assessment, provided if the escape is for more than one year, all back years shall be made on one assessment blank, and the current year's escape on a separate assessment for which he shall be entitled to an additional fee of fifty cents such fee to be added to and collected with taxes due."

It will be noted that the fee above provided for the tax assessor is for making return on property which has escaped taxation. Under the facts here presented, the tax assessor has made no return on any property. On the contrary the return was made by the tax collector. It is a well known rule of statutory construction that offices demanding fees must point to some clear, definite, and specific statute authorizing such fees. **Tillman, vs. Wood**, 58 Ala. 578; **Troup v. Morgan County**, 109 Ala. 162, 19 So. 503; **Ex Parte Mobile County**, 200 Ala. 410, 76 So. 2.

I find no statutory authority for the tax assessor to collect a fee on returns of property made by the tax collector. Neither do I find any statutory authority allowing this fee to the tax collector.

You are, therefore, advised that in my opinion neither the tax assessor nor the tax collector is entitled to a 50c fee on escape returns of property made by the tax collector.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 26, 1940.

Hon. Edward B. Crosland, Chief,
Division of Local Finance,
Department of Finance,
Capitol.

Municipalities — Under Section 1912 of the Code of 1923, "cities" are required to adopt a budget to the extent enumerated therein. Said section is not applicable to "towns." Municipalities which adopt a budget (whether the making of same is mandatory or not) must submit certified copies to the Department of Finance within thirty days after adoption thereof under Section 5(18) of Act No. 112, H. 72 approved March 7, 1939 (General Acts 1939, page 144).

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of January 10, 1940, in which you request my opinion as follows:

"In administering one of the functions and duties of the Department of Finance as prescribed by Subsection 18 of Section 5 of Act No. 112, H. B. No. 72, approved March 7, 1939, the question has arisen if municipal corporations are required to adopt an annual budget, and to submit to the Department of Finance a certified copy of same within thirty days after the adoption thereof. Said Subsection 18 of Section 5 is as follows:

"Section 5. '(18)—To require all counties, municipal corporations, political subdivisions and local public bodies (except boards of education and County Boards and Departments of Public Welfare) to submit certified copies of their annual budgets within thirty days after the adoption thereof. It shall be the duty of each such county, municipal corporation, political subdivision and local public body to submit a certified copy of its annual budget within such period.'

"In determining this matter, I wish to call your attention to Section 1912, Code of Alabama, 1923, which is as follows:

"Section 1912 — 'Appropriations annually made by council. — In all cities, the council shall appropriate the sums necessary for the expenditures of the several city departments, for the interest on its bonded and other indebtedness, not exceeding in the aggregate within ten per centum of its receipts, and such council shall not appropriate in the aggregate an amount in excess of its annual legally authorized revenue. But nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation was made, or from contracting for temporary loans as herein provided, or from bonding or refunding their outstanding indebtedness, or from appropriating anticipated revenue at any time for the current expenses of the city, and interest on the bonded and other indebtedness of the city.'

"The opinion has been advanced that since the above quoted Sub-section 18 of Section 5 does not specifically state that municipal corporations must adopt a budget, that it is not incumbent upon a municipal corporation to adopt a budget unless it so desires, and, it would naturally follow, that a copy of same would not be submitted to the Department of Finance unless such action was taken by the municipal corporation. In support of said contention, Section 19 of Act No. 112, supra, is cited. Said Section 19 is in pertinent part as follows:

"Section 19. RULES AND REGULATIONS: PENALTIES FOR VIOLATIONS THEREOF. * * * * Anything herein to the contrary notwithstanding, the Department of Finance shall have no power to adopt any rule which shall impose any mandatory duties upon counties, municipal corporations, political subdivisions and local public bodies, including counties and city boards of education, other than such mandatory duties as may be imposed upon them by this act."

"I respectfully request your official opinion as to whether there is a mandatory duty imposed upon municipal corporations to adopt an annual budget, and to submit to the Department of Finance a certified copy of same within thirty days after the adoption thereof, or if municipal corporations are required to submit certified copies of their annual budgets if and when same might be adopted."

The only provisions of the general law which I am able to find that relate in any way to municipal budgets is Section 1912 of the Code of 1923, which is quoted in your letter.

In defining the word "budget" as noun, the following appears in 12 *Corpus Juris Secundum* 375:

"The word has been said to have a well-recognized general meaning, and has been defined as a balance sheet of estimated receipts and expenditures; and account of the ways and means by which the income and expenditure for a definite period are to be balanced, generally by a finance minister for his state, or by analogy to small bodies. As applied to governments or governmental units, 'budget' has been defined or employed as meaning an estimate as to the probable expenditures to be incurred during the ensuing year, and of revenues hoped for with which to pay; a plan for proposed expenditures and estimated revenues for the particular fiscal year to which it relates; a plan or method by means of which the expenditures and revenues are so controlled for a definite period, by some budgetary authority, as to effect a balance between income and expenditures; * * * "

Bearing in mind the above definitions of the word "budget," it is my judgment that Section 1912, supra, requires cities to adopt a "budget" to the extent enumerated in said section.

It will here be noted that said section applies only to "cities" and not to towns. Section 1743 of the Code of 1923 classifies "cities" and "towns." "Cities" are defined as municipal corporations containing two thousand or more inhabitants. "Towns" are defined as incorporated municipalities containing one hundred and less than two thousand inhabitants.

I do not think that Section 5(18) of Act No. 112, H. 72, approved March 7, 1939, General Acts 1939, page 144, pamphlet) quoted in your letter, requires municipal corporations to make a budget where none was otherwise required. Said section merely requires the submission of certified copies of certain annual budgets within thirty days after the adoption thereof. This requirement must, of course, be contingent upon the making of a budget. If a budget is not made, it cannot be submitted. However, if a budget is made, in my opinion, it must be submitted under Section 5(18), supra, whether the making of same is mandatory or not.

The premises considered, it is my opinion that your inquiries should be answered as follows:

(1) Under the general law there is a mandatory duty imposed upon all cities (viz., incorporated municipalities containing two thousand or more inhabitants) to adopt an annual budget to the extent enumerated in Section 1912 of the Code of 1923, supra.

(2) Under the general law there is no mandatory duty imposed upon towns (viz., incorporated municipalities containing more than one hundred and less than two thousand inhabitants) to adopt an annual budget.

(3) All municipal corporations (whether cities or towns) which adopt an annual budget are required to submit certified copies of same to the Department of Finance within thirty days after the adoption thereof under Section 5(18), supra. This is true regardless of whether or not it is mandatory upon such municipalities to adopt a budget. The certified copies of annual budgets actually adopted should be submitted to the Department of Finance. "Cities" which adopt a budget which is in greater detail than that required under Section 1912, supra, should submit the budget actually adopted.

The above conclusions are based on provisions of general law only. In each particular case the charter of the municipality in question should be considered. Also, in cases where municipalities are operating under special or local law, said laws should be taken into consideration.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1940.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act — Licenses — Counties—

Under the Alabama Beverage Control Act, the county governing body of a wet county in the state has the right, by resolution, to levy a license in one amount on retail dispensers of malt or brewed

beverages who do not permit sales for consumption on the premises and a license in another and higher amount on retail dispensers who do permit sales for consumption on the premises.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 21, 1940, in which you request my opinion as follows:

"Attached hereto you will find a copy of Resolution adopted by the Commission of Jefferson County on May 14, 1940, which reduces the county levy of Jefferson County from \$30.00 to \$15.00 for the remaining portion of 1940 on retail beer establishments which do not permit sales for on-premises consumption.

"On April 1, 1937, in an opinion addressed to Mr. John D. McNeel, the Attorney General's office held that the county governing bodies of wet counties had the right by resolution to levy a license on retail dispensers in such an amount as the governing body might determine. On May 6, 1937, in an opinion addressed to Hon. R. E. Smith of the Jefferson County Commission, the Attorney General's office held that counties were without authority to levy a bottle tax on malt or brewed beverages and in arriving at this opinion, you called to his attention that the license which counties have authority to levy by virtue of the provisions of the Alabama Beverage Control Act are the only licenses, taxes or fees which the Act authorizes the counties to levy.

"The Alabama Beverage Control Act makes no provision for a reduction in a retail malt or brewed beverage license regardless of whether it is for off or on-premises consumption and it will be appreciated very much if you will advise us as soon as possible whether or not the Commission of Jefferson County has the authority to reduce the levy as outlined in the attached Resolution inasmuch as they will then have two different levies for retail dispensers of malt or brewed beverages."

The resolution of the county governing body of Jefferson County, which was attached to your letter of inquiry, is as follows:

"BE IT RESOLVED by the County Commission of Jefferson County, as follows:

"Each retailer of malt or brewed beverages commencing business subsequent to the adoption of this resolution, where such retailer does not sell such beverages to be consumed at nor permits any such beverages to be consumed at his place of business shall, prior to engaging in such business within such county, pay to the Alabama Alcoholic Beverage Control Board the sum of Fifteen (\$15.00) Dollars as a license for Jefferson County, Alabama, for the privilege of engaging in such business during the remainder of the calendar year of 1940.

"Be it further resolved that the license hereby levied shall only apply to retailers selling such beverages where such beverages are not to

be consumed at, and where the retailer does not permit any such beverages to be consumed at, his place of business.

"Be it further resolved that the license for each retailer engaging in the sale of such beverages, where such beverages are consumed at his place of business, shall remain on the basis as heretofore provided by resolution duly adopted by this Commission.

"Be it further resolved that this resolution shall be effective from the date of its adoption down to and including December 31, 1940, upon which date it shall automatically expire and after which date each retailer of malt or brewed beverages, whether such beverages are consumed at the place of business of the retailer or not, shall pay the license of Thirty (\$30.00) Dollars heretofore levied by this Commission for the privilege of engaging in such business.

"Be it further resolved, that copy of this resolution be filed with the Alabama Alcoholic Beverage Control Board."

In the opinion addressed to Hon. John D. McNeel, Administrator, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of April 1, 1937, referred to in your letter of inquiry, which is found in Quarterly Report of Attorney General, Vol. VII, page 1, the right of a county governing body of a wet county in the State of Alabama to levy a license on a retail dispenser of malt or brewed beverages under the Alabama Beverage Control Act was sustained. In the course of that opinion, the pertinent provisions of the Alabama Beverage Control Act were set out as follows:

"In regard to the right of counties to levy a license on retail dispensers of malt or brewed beverages, we find the following provisions:

"Subsection (3) of Section 22, which is the section dealing with license fees and the distribution of revenues, reads as follows:

" 'In the case of a retail dispenser, such license fee as may be levied by the county in which his place of business is located, and shall be paid to the Board,'

"and Sub-section (7) of the same section contains the following proviso:

" 'License fees paid for retail dispenser licenses shall be paid by the Board to the counties in which the licensed places are located, and in which such licenses are levied.'

"Sub-paragraph (1) of Sub-section (c) of Section 21 of said Act provides a graduated scale for licenses for retail dispensers of malt or brewed beverages where one retail dispenser operates more than one such place for the sale of malt or brewed beverages."

It is true that, in an opinion rendered to Hon. R. E. Smith, President Pro Tem, Jefferson County Commission, Birmingham, Alabama, under date of May 6, 1937, also referred to in your letter of inquiry, which opinion is found in Quarterly Report of Attorney General, Vol. VII, page 89, after

reference was made to the opinion rendered to Mr. McNeel, *supra*, it was stated:

"In this regard, it will be noted that the licenses which counties have the authority to levy by virtue of the provisions of the Alabama Beverage Control Act, are the only licenses, taxes or fees which the Act authorizes the counties to levy."

See also the opinion rendered on the same date to Hon. O. L. Andrews, Clerk, Circuit Court, Tenth Judicial Circuit of Alabama, Birmingham, Alabama, Quarterly Report of Attorney General, Vol. VII, page 90. However, a license such as the one described in your letter of inquiry is the very type of license which it was held in the opinion to Mr. McNeel, *supra*, a county governing body of a wet county in the state had the right to levy on a retail dispenser of malt or brewed beverages under the Alabama Beverage Control Act.

The only legal proposition presented by your inquiry is whether or not the classification made by the county governing body of Jefferson County in the resolution, *supra*, was reasonable and was within the power and authority of said body to make. In my opinion, such classification is reasonable and also within the power and authority of the county governing body of Jefferson County to make. I quote in extenso from the opinion of Mr. Justice Knight for the Supreme Court of Alabama in the case of **City of Tuscaloosa v. Hanly**, 227 Ala. 513, 150 So. 499, which, in my opinion, is peculiarly apt authority for the conclusion hereinabove reached:

"We are not impressed by the argument advanced by appellee that the classification attempted by the ordinance is unreasonable or capricious, or an unjust or unwarranted discrimination between the two classes — one who would confine their charges and interest to 2 per cent. per month, and the other with no limitation as to charge whatever — with the sky, so to speak, as the limit. It is but natural to suppose that the latter class would reap a larger harvest from its loan business unbridled as to interest rate, and would undoubtedly require closer scrutiny from the municipality. Such a tax is not imposed simply for revenue but also to pay the reasonable and legitimate expense of supervision of the business.

"The only limitation on the discretion in making classification is that the classification must not be arbitrary, a mere subterfuge to shield one class and burden the other.' *Woco Pep Co. of Montgomery v. Butler*, Chairman of State Tax Commission, et al., 225 Ala. 256, 142 So. 509, 512; *Moog v. Randolph*, 77 Ala. 597; *Postal Tel. Cable Co. v. City of Decatur*, 16 Ala. App. 684, 81 So. 204; *Toyata v. Territory of Hawaii*, 226 U. S. 184, 33 S. Ct. 47, 57 L. Ed. 180.

"In the case of *Kenamer v. State*, 150 Ala. 74, 43 So. 482, 483, this court held that 'the lawmakers are free to create classes upon whom the taxing power may be laid, and the only uniformity requisite is that subjects of the same class are made to bear, equally and uniformly, the burden imposed.' *Western Union Tel. Co. v. State Board*, 80 Ala. 280, 60 Am. Rep. 99.'

"In the ordinance before us the city has attempted to place in one class all who would charge borrowers, by way of interest and charges, at

a rate not in excess of 2 per cent. per month, and into another class those who would charge borrowers, at any rate the lender might see proper, in excess of 2 per cent. per annum. In one, the rapacity of the lender is bridled; while in the other the lender might go to any extreme that conscience would dictate, or the need of the borrower would permit.

"We do not think there is anything in the contention that the ordinance is void because of an unreasonable, unjust, or capricious classification."

See also *Smith v. State*, 20 Ala. App. 116, 101 So. 910, cert. den. *Ex Parte Smith*, 212 Ala. 262, 102 So. 122; *Madison County v. Gwathney*, 212 Ala. 566, 103 So. 656; *Woco Pep Co. of Montgomery v. City of Montgomery*, 213 Ala. 452, 105 So. 214; *American Bakeries Co. v. City Opelika*, 229 Ala. 388, 157 So. 206, and other cases collated in 13 *Alabama Digest, Licenses*, Key Nos. 7(1), 7(3).

By the resolution of the county governing body of Jefferson County, the county has attempted to place in one class the retail dispensers of malt or brewed beverages who do not permit sales for consumption on the premises, on which is levied an annual license of \$15.00, and into another class those retail dispensers of malt or brewed beverages who do permit sales for consumption on the premises upon which is levied a license of \$30.00. It is but natural to suppose that the latter class would reap a greater harvest from its business of dispensing malt or brewed beverages at retail than would the former. It is apparent that the policing of retail than would the former. It is apparent that the policing of retail dispensers of malt or brewed beverages who do not permit sales for consumption on the premises would not be as difficult as the policing of retail dispensers of malt or brewed beverages who do permit sales for consumption on the premises. Consequently, on the basis of the authorities above cited and quoted from, it is my judgment that the classification of retail dispensers of malt or brewed beverages made by the resolution of the county governing body of Jefferson County, and the different licenses imposed upon the two classifications are reasonable, and that the resolution was within the power and authority of the county governing body of Jefferson County to make.

Of course, under the provisions of the Alabama Beverage Control Act (see Subsection (r) of Section 2 and Subsection (c) of Section 22) the license issued by the Alabama Alcoholic Beverage Control Board to a retail dispenser of malt or brewed beverages gives to such licensee the right to sell malt or brewed beverages for consumption on or off the premises licensed. However, in my opinion, this fact does not interfere with the right and power of the county governing body of Jefferson County to levy a lesser license on retail dispensers who do not permit sales for consumption on the premises than the license which it levies on retail dispensers who permit sales for consumption on the premises.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 28, 1940.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Merit System Act — Highway employees—

Leaves of absence—

1. Highway employee absent from duty because of illness or bodily injury incurred in line of duty may be granted "special leave" on full or part pay upon recommendation to the Personnel Board by the State Board of Adjustment, even though such employee may be covered by Workmen's Compensation Insurance.

2. The State Board of Adjustment may require highway employee covered by Workmen's Compensation Insurance to pay over monies received thereunder to State before recommending "special leave."

3. State Board of Adjustment may make such other requirements as it deems proper before recommending "special leave" on full or part pay to highway employee, but full pay should not be allowed in addition to Workmen's Compensation, for absence, received by such employee.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 30, 1940, in which you request my opinion as follows:

"Under Section 6 (1303) of the Highway Code, the State Highway Department carries Workmen's Compensation Insurance covering death or injury of employees suffered in the actual performance of their duties.

"Under the Workmen's Compensation Act and in accordance with our contract with our insurance carrier, an employee, when injured, will not be paid for the first two weeks of disability. Should employee be unable to resume his duties for a period exceeding two weeks, he will be paid for the number of days beyond the waiting period of two weeks. If, however, employee is disabled for a period of four weeks or more, then the employee would be entitled to compensation from date of injury and the compensation for the two weeks' waiting period would then be included in the second check.

"Under Rule X, Paragraph 5 of subsection (b) of Section 4 of Rules of the State Personnel Board, it is noted that employees injured in discharge of their duties may be granted special leave on full or part pay on recommendation of the State Board of Adjustment. Paragraph 4 of said subsection provides in part as follows:

"Sick leave is hereby defined to mean the absence from duty of an employee because of illness or bodily injury **not** incurred in line of duty.'

"Taking into consideration that an employee would not be allowed sick leave if injured in line of duty and also taking into consideration that employees of this Department, other than office workers, are covered with Workmen's Compensation insurance which protects them up to 65% of their average weekly wages (depending on number of dependents), would employees of the Highway Department be entitled to consideration under said Paragraph 5 of Subsection (b) of Section 4 of Rule X?

"If you rule that employees of the Highway Department are not entitled to consideration by the Board of Adjustment account of Workmen's Compensation Insurance carried, then will you advise if our employees injured in line of duty would be entitled to sick leave as any other employee of the State, it being my understanding that in eliminating injured employees from the sick leave provisions, it was done with a view of the Board of Adjustment allowing full or part pay during absence from duties account of accident and injury in line of duty.

"If you rule that an employee of the Highway Department is entitled to the same consideration, at the hands of the State Board of Adjustment (under Rule X of the State Personnel Board) as any other State employee and employee is allowed full pay during period of disability, then I feel sure you would rule that it would be proper for such employee to endorse any Workmen's Compensation checks he receives to the State, except checks received for permanent disability such as loss of eye, arm, etc.

"If the Board of Adjustment allowed half pay, then I feel sure you would deem it proper that employee be allowed such part of Workmen's Compensation as would bring his pay to regular rate of pay for such employee.

"The Rules of the State Personnel Board allow an employee 1 day sick leave and 1 day vacation for each month worked for the State. However, said rules state also in part, 'Sick leave with pay is not a right for which employees may make demand, but a privilege granted by the Board in accordance with prescribed rules, etc.' (No mention is made of annual vacation in this connection).

"If you rule the State Board of Adjustment should not allow employees of the Highway Department special leave with full pay or part pay and that such employees should be allowed sick leave in accordance with the rules of the Personnel Board, as all other State employees, and an employee is absent from his duties but carried on the payroll, using as authority for carrying such employee on payroll has earned and accumulated sick leave, should such employee endorse any Workmen's Compensation checks he receives account of accident, to the State, taking into consideration that part of rule of the State Personnel Board ('Sick leave with pay is not a right for which employee may make demand, etc.'). If you rule he should endorse checks to the State, should such employee be charged with sick leave earned, or with sick leave advanced? If an injured employee uses any part of his vacation earned in

order to stay on payroll and receives Workmen's Compensation check for the vacation period thus used, should employee endorse Workmen's Compensation check received for such period to State.

"I would like for you to advise me further as to the employee who is injured and loses less than two weeks and receives no Workmen's Compensation for loss of time."

Before answering your specific inquiries, let me call your attention to the pertinent provisions of the rules of the State Personnel Board approved by the Personnel Board on September 29, 1939. These rules were adopted by the Personnel Board in accordance with, and under the provisions of, Section 9 of the Merit System Act (Act No. 58, S. 44, approved March 2, 1939, General Acts, 1939, p. 68). Section 4(b) of Rule X relates to sick leave. "Sick leave," according to the rule, is defined to mean:

"* * * the absence from duty of an employee because of illness or bodily injury **not incurred in line of duty**, exposure to contagious diseases or attendance upon members of the family within the household of the employee whose illness requires the care of such employee, or death in the immediate family of the employee." (Emphasis supplied)

It is further provided that:

"Sick leave with pay is not a right for which employees may make demand, but a privilege granted by the Board in accordance with prescribed rules and regulations which may be changed from time to time, or to which the Board may make exceptions, as the best interests of the of the service demand."

It will be noted, therefore, that where an employee is absent from duty because of illness or bodily injury incurred in line of duty the provisions of the rules and regulations relating to "sick leave" are not applicable. The Personnel Board has made specific provision for such absence by providing in the rules and regulations, also in Subsection (b) of Section 4 of Rule X, that:

"In case of absence from duty because of illness or bodily injury incurred in line of duty, an employee may be granted a special leave on full or part pay upon recommendation to the Board by the State Board of Adjustment."

It appears, therefore, that employees who are absent from duty because of illness or bodily injury incurred in line of duty, regardless of whether such absence is for a period of only a few days duration or whether it be for weeks or months, must apply to the State Board of Adjustment for "special leave" and such "special leave" must be recommended by the State Board of Adjustment to the Personnel Board (on such terms as the State Board of Adjustment determines, i. e., whether full or part pay) before such an employee may receive pay for the time during which he was absent.

In view of the fact, according to the quoted provision of Subsection (b) of Section 4 of Rule X, *supra*, the State Board of Adjustment is given full authority to determine whether an employee who is absent from duty because of illness or bodily injury incurred in line of duty shall be entitled to the "special leave" on full or part pay, it becomes at once apparent that

the State Board of Adjustment may determine that an employee who is entitled to workmen's Compensation should endorse his compensation check to the State before it will recommend that he receive "special leave" on full pay. This is clear for the reason that the rules of the Board above quoted allow "special leave" on full or part pay—making no provision for double pay. In short, the purpose of the rules, in my opinion, is to provide compensation for an employee who, because of illness or bodily injury incurred in line of duty has been forced into absence from duty. If the employee is compensated only in part from other sources for the time absent then, in my opinion, the State Board of Adjustment would be authorized to recommend that the balance be paid such employee from State funds under such terms and conditions as it sees fit to impose thereon.

The terms imposed by the State Board of Adjustment upon the granting of "special leave", i. e., whether it be on full or part pay, whether the employee be required to endorse his compensation check to the State, whether the employee be permitted to keep the compensation check and the State required to pay the difference between the amount of such check and such amount as would constitute "full pay" for the employee, are matters for the determination of the State Board of Adjustment in the exercise of the discretion given it by the rules of the Personnel Board.

The premises considered, your first question, i. e., whether employees of the Highway Department would be entitled to compensation under Paragraph 5 of Subsection (b) of Section 4 of Rule X, providing for "special leave" for employees absent because of illness or bodily injury incurred in line of duty, should be answered in the affirmative, for it will be seen that this section contains no indication that the Personnel Board intended it not to be applicable to employees covered by Workmen's Compensation Insurance.

Your other questions have been answered in the course of the above discussion and I do not believe it necessary to treat them further.

You, of course, understand that the rules of the Personnel Board as to "sick leave" are applicable to employees of the Highway Department who are absent from duty because of illness or bodily injury not incurred in line of duty in the same manner as such rules apply to other employees in the State Service.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

Hon. W. E. Butler,
Judge of Probate,
Madison County,
Huntsville, Alabama.

June 28, 1940.

An executory contract which conveys no present interest in real or personal property is not subject to filing tax.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of June 21, 1940 follows:

"In re: Contract Alabama Power Company and T. V. A. et als.

"Messrs. Lanier, Price and Shaver, Attorneys for the City of Huntsville, will file for record in this office, as soon as the filing tax question can be settled, a contract dated as of May 7, 1940, between the Alabama Power Company and the Tennessee Valley Authority, et als. This contract consists of 104 pages of printed matter and 15 maps all of which are to be recorded and ready for return to the parties before the closing date, which is July 1, 1940.

"Inasmuch as the property is located in several counties, I do not believe I am authorized under the statutes to fix the amount of filing tax; however, under the General Acts of 1935, page 456, Schedule 46, it appears that I am to certify the facts, together with a description of the property covered, to the State Department of Revenue. I have only one copy of the document, but the Attorneys for the City of Huntsville tell me that a copy of this contract is on file with the Public Service Commission in Montgomery. The recited consideration to be paid by eleven enumerated purchasers, (one of whom is the Tennessee Valley Authority, four of whom are municipalities, and six of whom are Power Associations, co-operatives and corporations) is \$4,600,000.00. This contract at first reading appears to set out the intent of the contracting parties very clearly; and describes in detail property to be sold by the Power Company to each of the grantees. The contract is so specific that even though mention is made of formal conveyance of the properties to be made as of the closing date, most of the terms and provisions seem to be effective from and after the closing date without specific qualification that deeds be issued to make the agreement effective.

"In addition to the problem of whether or not the contract is taxable, there is the question of exemption from such tax of certain of the grantees, hence, unless I have the protection of your opinion and of instructions from the State Department of Revenue, I shall be obliged to protect my self, by asking that the parties filing the contract, deposit with me an amount equivalent to the mortgage tax (which is the senior of the two taxes, deed and mortgage tax.).

"I shall appreciate your advice and assistance in the matter at the earliest convenient date, as it will take considerable time to record this document after I receive instructions in the matter of the filing tax."

I have carefully read and studied the contract entered into by and between Alabama Power Company and the Tennessee Valley Authority et al., and advise that in my opinion said contract is not subject to either the

deed filing tax as imposed by Schedule 46 of Section 348, or the mortgage filing tax imposed by Schedule 94 of Section 348 of the Revenue Act of 1935.

The contract in my opinion is an executory contract the terms of which, in so far as the transfer of interest in real and personal property is concerned, are to be performed in the future, i. e., July 1, 1940.

In other words, under the state of facts disclosed by this contract, it cannot be said that it conveys title to any property real or personal, or any interest therein, as contemplated by Schedule 46 or Schedule 94 supra. As above stated, it is merely an executory contract, and the title to any property real or personal, or any interest therein, will not pass until the terms of the contract are complied with. The pertinent terms of such contract in this regard, being the payment by the various Purchasing Agencies to Alabama Power Company the sum of \$4,600,000, and the execution and delivery by Alabama Power Company to the various Purchasing Agencies, deeds conveying the property mention and set out in the several exhibits annexed to said contract.

This office has on numerous occasions held that instruments that convey no real or personal property, or any present interest therein, are not subject to either the deed or the mortgage filing tax. See **Quarterly Report of Attorney General**, Vol. XVI, page 166; **Quarterly Report Attorney General**, Vol. XVII; Opinion to Hon. W. G. Little, Probate Judge, Sumter County, dated January 5, 1937, **Office Edition, Book 14-A**.

Therefore, inasmuch as it cannot be said that this contract, to quote the language of the statute, (Schedules 46 and 94 supra) "conveys any real or personal property within this state" or "conveys any interest therein," nor can it be said that this contract is a mortgage "which is given to secure the payment of any debt, which conveys any real or personal property situated within this state, or any interest therein," within the meaning of these terms, it is not subject to the filing tax imposed for the privilege of record under the statute.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 29, 1940.

Hon. F. B. Pratt,
Superintendent of Education,
Bibb County,
Centreville, Alabama.

County Board of Education—

Term of office of member begins as soon after the General Election as member is qualified, as provided by Section 89 of the 1927 School Code.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of June 17, 1940, in which you request my opinion as follows:

"We have a new Board Member elected in the last primary election to succeed Mr. Robert Thrasher. This member has requested me to ask you when his term of office begins."

It is my opinion that the new member's term of office begins as soon as he has been qualified after the general election in November.

There is no local law affecting the term of office of the members of the Board of Education of Bibb County. Therefore, for the answer to your question we look to the general law of the state on this subject.

Section 89 of the 1927 School Code provides as follows:

"89. County Board Members: When Elected. — At the general election of State and County Officers a member or members shall be elected for terms of six years to succeed the member or members whose term or terms of office expire at that time. The members of the County Board of Education shall hold office until their successors have been elected and qualified. Before exercising any authority or performing any duties as a member of the County Board of Education, each member thereof shall qualify by taking and subscribing to the oath of office prescribed by Article Sixteen of the State Constitution, the certificate whereof shall be filed in the office of the Judge of Probate of the county."

As yet the new member has not been elected, but is simply the Democratic nominee. He will, no doubt, be elected to the position in the coming November General Election, and will begin his term of office as soon thereafter as he is duly qualified, as provided for by Section 89, *supra*. See opinion of the Attorney General to Hon. A. H. Collins, State Superintendent of Education, under date of January 23, 1939, Quarterly Report of Attorney General, Vol. XIV, page 51.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

Hon. J. Charles Stanley,
Tax Assessor, Calhoun County,
Anniston, Alabama.

June 29, 1940.

A person who begins the construction of a home prior to October 1 and intends to occupy such home as a residence for himself and family upon completion, is entitled to homestead exemptions thereon, regardless of the fact that the home is not completed until after October 1.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of recent date follows:

"A person began construction of home prior to October 1, house not being completed by October 1, but is completed or finished to extent owner moves in home in November. Can homestead be granted?"

My answer to your inquiry is in the affirmative.

I have been advised by you subsequent to the date of the above request that the person in question began the construction of his home sometime prior to October 1, 1939, and that such person intended to move his family into this home upon its completion, and to thereafter occupy such home as his permanent residence.

The Supreme Court of this State in the case of **Blum vs. Carter**, 63 Ala. 235, after considering numerous cases from other jurisdictions, laid down the following rule in regard to homestead exemptions:

"Guided by these principles, we hold that, to constitute a valid claim of homestead, there must be an occupancy in fact, or a clearly defined intention of present residence and actual occupation, delayed only by the time necessary to effect removal, or to complete needed repairs, or a dwelling-house in process of construction. An undefined, floating intention to build or occupy at some future time, is not enough. And this intention must not be a secret, uncommunicated purpose. It must be shown by acts of preparation of visible character, or by something equivalent to this. — *Daniel v. Collins*, 57 Ala. 625; *Boyle v. Shulman*, 59 Ala. 566; *Preiss v. Campbell*, *Ib.* 635; *Chambers v. McPhaul*, 55 Ala. 367."

Our Supreme Court in the recent case of **W. T. Raleigh Co. vs. Patterson et al.**, 195 So. 729 laid down and followed the rule as enunciated in the *Blum* case, *supra*.

In my opinion, the facts presented in your request bring the person in question within the rule as laid down in the *Blum* case, *supra*. That is to say, the dwelling house was in the process of construction prior to October 1, 1939 and the person in question showed by his acts and statements that he intended to occupy such home as a homestead immediately upon its completion.

I ask that you substitute this opinion for my answer to the second question in my letter addressed to you under date of January 9, 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 29, 1940.

Hon. B. P. Singleton,
Chief Examiner, Public Accounts,
Department of Finance,
Capitol.

Counties—County governing body of Dallas County is not authorized to donate county funds to the Young Men's Christian Association.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion dated June 18, 1940 follows:

"Will you please advise me whether or not the Court of County Revenues of Dallas County has the authority to donate \$500.00, or any other amount, to the Young Men's Christian Association?

"I am informed that the Dallas County Court is under the impression that authority for a donation of this nature is included in Act No. 195, Page 226, Local Acts of 1936-37, Special Session. In connection with this Act, however, I wish to bring to your attention that the privileges contained therein are for **County Purposes.**"

In my opinion your question should be answered in the negative.

There is no authority for the Court of County Revenues of Dallas County to make such a donation under the general law or under Act No. 195, H. 381, approved March 2, 1937, General Acts 1936-37, Extra Session, page 226, which provides as follows:

"Section 1. That Courts of County Commissioners, Boards of Revenue, and other Courts of like jurisdiction, in counties in this State having a population of not less than 47,000 and not more than 57,000, according to the Federal Census of 1930 and which may hereafter have such population according to any Federal Census hereafter taken, are hereby authorized to appropriate out of any monies in the County treasury not otherwise appropriated and to expend not exceeding the sum of twelve hundred (\$1200.00) Dollars per annum for any **county purposes not otherwise provided for by law that in their judgment are worthy and for the interest of the county.**"

This office has held that county governing bodies have no authority under the general law to contribute county funds for:

(a) a private corporation for the purpose of reducing the circulation of communistic literature. Quarterly Report Attorney General, Vol. XIV, page 272;

(b) An American Legion Convention, Quarterly Report, Attorney General, Vol. III, p. 44;

(c) the support of local Red Cross Organizations. Opinion to Chief Examiner, Department of Examiners of Accounts, November 18, 1930, **Attorney General's Opinions, Office Edition, Vol. 1, page 122.**

In the case of **Rogers, Treasurer, v. White, Secretary**, 14 Ala. App. 482, 70 So. 994, our Supreme Court held that a local act for Jefferson County providing that county funds should be paid to the secretary of the Birmingham Bar Association to be used by the Birmingham Bar Association to be used by the Birmingham Bar Association for the maintenance of a public law library in Jefferson County was unconstitutional and void.

In **Johnson et al. v. Donham et al.**, 84 S. W. 374, the Supreme Court of Arkansas in 1935, in reference to "county purposes," said:

"We discover no express provision giving to the court the power to expend money for the purpose of purchasing a law library, nor can we find any from which that power might be implied. The 'county purposes' for which the county's money may be disbursed are those purposes which promote the welfare of the county as a whole and of its citizens—such as, the erection of county buildings, bridges over county roads, and such other purposes as would promote the general health and welfare of its citizens—and could hardly be extended to include the purchase of a law library for the use of a state or district officer as is the prosecuting attorney. This is true although the title to the books purchased might be in the county."

See also: **In re Hunter Estate**, 49 Pac. (2), p. 1009.

Independently of how worthy and needful the cause presented may be, and regardless of how earnestly this office may concur in the advantages that might flow from an opposite ruling, I am constrained to hold that a donation to the Young Men's Christian Association, a private association, is not such an appropriation for "county purposes" so as to come within the purview of Act No. 195, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 29, 1940.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

• Counties—Expenses of Sheriff's investigation of crime—

Reasonable expenses incurred by sheriff in investigating crime under Section 10190 of the Code of Alabama, 1923, including expenses incurred in employment of a Pathologist, traveling expenses and

sheriff's fee, when approved by the authority directing the investigation, may be paid by the county as is authorized by Section 10191 of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 18, 1940, in which you request my opinion as follows:

"A claim has been filed with the Commissioners Court of Elmore County, Alabama, by the Sheriff of Elmore County for \$25.00 for expenses incurred in the employment of Dr. Herman D. Jones, Pathologist, in connection with the investigation of the death of a person who recently died in Elmore County under apparent peculiar circumstances.

"It appears from the claim that is filed that the Circuit Solicitor directed the Sheriff in writing to make an investigation as provided by Section 10190 of the Code of Alabama of 1923, and that in making such investigation the Sheriff found that there was certain information necessary and that to obtain such necessary information, it would be advisable to employ Dr. Herman D. Jones, Pathologist, at Auburn, Alabama.

"Dr. Jones does not appear to be a practicing physician but is a practicing Pathologist. The affidavit attached to his claim shows that he holds a Ph. D. degree from the school of medicine of Vanderbilt University, is an Associate Professor of Biochemistry at the Alabama Polytechnic Institute, and has performed approximately 125 autopsies.

"If the Commissioners Court of Elmore County finds that such services of Dr. Herman D. Jones was necessary to obtain essential evidence of the type that was required and that the sum of \$25.00 was reasonable for the services rendered by Dr. Jones, including the traveling expenses of Dr. Jones, will the Commissioners Court be authorized to pay such claim?

"The Sheriff's claim also includes one day's services for Sheriff, \$2.00, and also \$3.60 as traveling expenses for the Sheriff in traveling 72 miles in connection with the investigation.

"You will please advise me whether or not these additional charges of the Sheriff may be paid by the Commissioners Court.

"The entire claim has been approved by the Solicitor that directed the investigation."

Answering your inquiry, I call your attention to an opinion rendered under date of January 25, 1940, to Hon. E. W. Vance, Member, Board of Revenue, Barbour County, Eufaula, Alabama, Quarterly Report of Attorney General, Vol. XVIII, page 90, wherein it was held that the reasonable expenses of the investigation of crime made by a sheriff under Section 10190 of the Code of Alabama, 1923, when approved by the authority directing the investigation, may be paid by the county, as is authorized by Section 10191 of the Code.

You will note from Section 10191, supra, which is set out in full in the Vance opinion, that it is provided that:

"* * * for such investigation in addition to his expenses which may include **any actual cost of travel** that was necessary, the sheriff shall be allowed a fee of four dollars, **but if the investigation consumes one day or less, then a fee of two dollars**, and the fee and allowed expenses must be paid in each case from the county treasury upon a warrant drawn according to law." (Emphasis supplied)

In the Vance opinion it was stated:

"In my opinion, Section 10191, supra, affords ample authority for the payment of the expenses reasonably and necessarily incurred by the sheriff in making the inquiry and investigation directed by the circuit solicitor. Of course, the sheriff is not given unbridled discretion as to the extent or the types of the services which he will employ in making the inquiry and investigation. The power is lodged in the county governing body to audit the claim for such expenses, after it is approved by said solicitor. This vests in the county governing body the duty to determine whether or not the services for which reimbursement is claimed were reasonably necessary to the conduct of the investigation. If such services were reasonably necessary the court has ample authority to audit and allow a claim therefor. * * *

"It is my opinion that the duty here imposed upon the sheriff is cumulative and sufficient authority for payment of the expenses of the sheriff's investigation, including a reasonable fee for a physician, is found in the provisions of Sections 10190 and 10191 of the Code of 1923, when these provisions are strictly followed."

You are, therefore, advised that if the county governing body determines that the services for which reimbursement is claimed were reasonably necessary for the conduct of the investigation, that the travel was necessary and that the sheriff consumed one day or less in the investigation, and if such claim for expenses is approved by the solicitor, it may allow the sum of \$25.00 for the services rendered by Dr. Jones, and it may also allow the sheriff the \$2.00 fee provided by Section 10191, supra, and travel expenses in the amount of \$3.60, which is at the rate of five cents per mile for the seventy-two miles traveled. Your attention is called to the fact that this office has held in an opinion to Hon. B. P. Singleton, Chief Examiner of Accounts, Capitol, under date of May 23, 1940, copy of which is herewith enclosed for your convenience, that five cents per mile is a reasonable allowance to reimburse the owner for using his automobile for the benefit of the state.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

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